145

RECORD, CASE No. 13,491.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 327.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

IDA MAY COX.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED FEBRUARY 15, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 12, 1892.

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a [Seal United States Circuit Court, Eastern District of Texas, at Jefferson.]

Caption.

Pleas in the circuit court of the United States for the eastern district of Texas, in the fifth circuit, held at the United States court-rooms, in the city of Jefferson, in the district aforesaid, before the Honorable Chauncey B. Sabin, United States district judge for said eastern district of Texas, October 18th, at a regular and stated term of said court, in this year of our Lord one thousand eight hundred and eighty-eight.

W. E. SINGLETON, *Clerk.*

1 *Application for Writ of Error.*

In the United States Circuit Court, Eastern District of Texas, at Jefferson.

IDA MAY COX
vs.
BROWN and SHELDON, Receivers.

Now comes defendant John C. Brown, by attorney, and shows to the court that Lionel A. Sheldon, one of the defendants, has resigned his trust as receiver of the Texas and Pacific railway, and his resignation has been accepted by the court which appointed him, and the said Sheldon has now no interest in this suit, and the said John C. Brown is now the sole receiver of said Texas and Pacific railway and has the right to prosecute the defense to this suit in his own name alone; wherefore the said John C. Brown prays that he be allowed a writ of error to the Supreme Court of the United States, and that he be allowed to prosecute said writ of error in his own name alone, and that the court now fix the amount of bond to be given on said writ of error.

F. H. PRENDERGAST,
Attorney for Defendant.

Sworn to and subscribed before me this the 13th day of October, 1888.

W. E. SINGLETON, *Clerk.*

(Endorsed:) Ida May Cox *vs.* John C. Brown *et al.* Motion for writ of error. Filed October 13th, 1888. W. E. Singleton, clerk.

Order.

IDA MAY COX
vs.
JOHN C. BROWN *et al.*

OCTOBER 17TH, 1888.

This day came on to be heard the defendants' application for a writ of error, and it being shown to the court that the defendant

Lionel A. Sheldon has resigned his receivership and that defendant John C. Brown, as receiver, has authority to prosecute his defense to this suit alone—

It is therefore ordered that the said John C. Brown, receiver, be allowed a writ of error to the United States Supreme Court, and that he be allowed to prosecute said writ of error in his own name alone as receiver, and that the bond for writ of error be fixed at fifteen thousand dollars.

2 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the circuit court of the United States for the eastern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Mrs. Ida May Cox, plaintiff, and John C. Brown and Lionel A. Sheldon, receivers of the Texas and Pacific railway, defendant-, a manifest error hath happened, to the great damage of the said John C. Brown and Lionel A. Sheldon, receivers as aforesaid—the said L. A. Sheldon having resigned his trust, the said John C. Brown is permitted to prosecute this writ of error in his own name alone as receiver—as by John C. Brown'-, complaint as receiver appears, we, being willing *if* error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, 1889, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 17th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

W. E. SINGLETON,
Clerk of the Circuit Court of the U. S.

Allowed by—
CHAUNCEY B. SABIN,
U. S. District Judge for the Eastern District of Tex.

October 17th, 1888.

(Endorsed:) Mrs. Ida May Cox *vs.* J. C. Brown, receiver. Writ of error. Filed October 17th, 1888. W. E. Singleton, clerk.

3 *Bond.*

Know all men by these presents that we, John C. Brown, receiver of the Texas and Pacific railway, and —— —— and —— ——, are held and firmly bound unto Mrs. Ida May Cox in the full and just sum of fifteen thousand dollars, to be paid to the said Mrs. Ida May Cox, her certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day ——, in the year of our Lord one thousand eight hundred and eighty —.

Whereas lately, at a term of the United States circuit court for the eastern district of Texas, at Jefferson, in a suit pending in said court between Mrs. Ida May Cox, as plaintiff, and John C. Brown and Lionel A. Sheldon, receivers of the Texas and Pacific railway, a judgment was rendered against the said John C. Brown and Lionel A. Sheldon, as receivers of the Texas and Pacific railway, and the said John C. Brown, as receiver of the said Texas and Pacific railway, having obtained a writ of error and filed a copy -hereof in the clerk'- office of said court to reversee the judgment in the aforesaid suit, and a citation directed to the said Mrs. Ida May Cox, citing and admonishing her to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next, 1889:

Now, the condition of the above obligation is such that if the said John C. Brown, receiver of the Texas and Pacific railway, shall prosecute his writ of error to effect and answer all damages and cost if he fail to make his plea good, then the obligation to be void; else to remain in full force and virtue.

TEXAS & PACIFIC R'Y,
By JOHN C. BROWN, *Rec'r.*
L. KAHN.
W. H. POLAND.

Sealed and delivered in presence of—
F. H. PRENDERGAST,
Witness to signature of L. Kahn & W. H. Poland.

Approved by—
CHAUNCEY B. SABIN,
U. S. District Judge for the Eastern District of Texas.

STATE OF TEXAS, }
County of Dallas. }

Before me, M. L. Robertson, a notary public in and for the county of Dallas, in the State of Texas, on this day personally appeared John C. Brown, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he, as receiver of the Texas and Pacific railway, executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 19th day of October, 1888.

M. L. ROBERTSON,
Notary Public, Dallas County, Texas.

Bond filed October 31st, 1888.

W. E. SINGLETON, *Clerk.*

4 The United States of America to Mrs. Ida May Cox, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, 1889, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Jefferson, wherein John C. Brown, receiver of the Texas & Pacific railway, — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Chauncey B. Sabin, judge of the circuit court of the United States for the eastern district of Texas, this 25th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

CHAUNCEY B. SABIN,
U. S. District Judge for the Eastern District of Texas.

[Endorsed:] Filed Oct. 31st, 1888. W. E. Singleton, clerk.

5 *Acceptance of Service.*

IDA MAY COX
vs.
BROWN and SHELDON, Receivers.

Suit pending in the U. S. circuit court, eastern district of Texas, at Jefferson.

I hereby accept service of the writ of error sued out by John C. Brown, receiver, in the above cause.

ALEXANDER POPE,
Att'y for Ida May Cox.

(Endorsed:) Ida May Cox *vs.* Brown and Sheldon, receivers. Acceptance of service of writ of error. Filed October 31st, 1888. W. E. Singlten, clerk.

6 *Original Petition.*

In the United States Circuit Court in and for the Eastern District of Texas, Holding Session at Jefferson, Texas, to September Term, A. D. 1887.

To the honorable United States circuit court in and for the eastern district of the State of Texas, holding session in and for the State of Texas, at the city of Jefferson, Texas:

Your petitioner, Mrs. Ida May Cox, a *feme sole*, a resident citizen of the county of Harrison and State of Texas, complaining herein of John C. Brown and Lionel A. Sheldon, as receivers of the Texas and Pacific railway, would respectfully show unto your honor that on or about the 16th day of December, A. D. 1885, the Texas and Pacific Railway Company was a railroad corporation operating — running a line of railway from the city of El Paso, in the State of Texas, to the city of New Orleans, in the State of Louisiana, and from Fort Worth, via *of* Sherman and via *of* Texarkana, to Marshall, Texas, and that on or about said date the honorable United States circuit court in and for the eastern distric- of Louisiana, holding session at the city of New Orleans, Louisiana, made its order placing all of the line of railway, together with all of its properties of the said railway, in the hands and charge of receivers, and appointed John C. Brown and Lionel A. Sheldon receivers of said properties and of s-id railway; that said Brown and Sheldon qual*li*fied at once as such receivers, and have been ever since and are now the receivers of the said railway and its properties; that said Brown reside- in the city and county of Dallas, in the State of Texas, and Lionel A. Sheldon resides in the State of Louisiana, and that said receivers have an agent representing them residing in the county of Marion, in the State of Texas, and J. J. Kurtin is division superintend*a*nt for said receivers, residing in county of Harrison. Plaintiff avers that on January 6th, 1887, said receivers were operating said line of railway from Marshall, Texas, to New Orleans, Louisiana, as common carriers of freight and passengers for hire, and that on January 6th, 1887, Chas. Cox was in the employment of said receivers as conductor of a train of cars on said line of railway, and that said train of cars of which said Cox had charge as conductor for said receivers was at a station *at* said line of railway called Boyce, and that said Cox was about to couple the train of cars together, preparing to go*ing* on his trip, when, on account of the gross negligence of the said receivers, the cars ran over the leg of the said Cox, seriousle injuring said Cox, mashing and breaking the leg of said Cox, from which injury so received said Cox di*de* on the 6th of January, 1887; that said receivers were guilty of negligence, carelessness, and misconduct that caused said Cox to be injured, from which injuries he died, in this, that the cross-ties were very rotten and of no account, totally unfit and unsuitable for the purposes for which they were being used, and that the road-bed

was unfit and unsuitable for the purposes for which it
7 was being used, and that the cross-ties were from six inches to two feet apart, rotten, and unsound, and that there was space six inches to two feet in between the cross-ties; that the road-bed was not surfaced up and the space in between the ties was not filled up with dirst as it should *be* have been done; that it was very dangerous, and it was the duty of said receivers to furnish safe and sound ties a-d safe and sound road-bed and to fill in between the ties with dirt and to put the ties close together, to leave no holes into which a person coupling up cars would be liable to step into and get hurt; that said Cox, when he went to couple up the train together, had to go and step on -he track where the ties were and wher- these holes were; tha- it is much more dangerous to have rotten and worthless cross-ties in a road-bed than to have a sound and suitable one, and that grass had grown over said ties and over and between said ties, and said receivers did not take that care they were bound to do and remove said grass; that having said grass to grow over said ties as it was when said Chas. Cox was kil-ed was gross negligence, misconduct, and careles-ness upon the part of said receivers, their agents and employees, and that ha-ing said grass there -ould prevent and one seeing the space in between the rotten ties and when about to couple the cars of a train together, and tended to cause the death of said Chas. Cox and tended greatly to cause said Chas. Cox'- death *the* injured as aforesaid; that said receivers, their -gents and employees, whose duty it was, fail- to properly furnish and keep in repair its road-bed, ties, and yard; t-at the place where the said Cox, dec'd, was injured was in the State of Louisiana, in the town called Boyce; that the laws of the State of Louisiana *is* substantially the same as the State of Texas; that the l-ws of Louisiana *is* substantially as foll-ws, to wit: "Every act whatever of a man that causes damages to another obliges him by whose fault it happened to repair it. The right of this action shall survive, in case of death, in favor of the minor children and widow of the deceased or either of them, and, in default of these, in favor of the surviving father and mother or either of them, from the space of one year from the death. Every person is responsible for the damage he occasions not merely by his acts, but by his negligence, his imprudence, or want of skill. We are responsible not only for the damages occasioned by our own acts, but that which is caused by the acts of persons for whom we are answerable or other things we have in custody;" that the said Chas. Cox, dec'd, left no child nor children nor descendant of a child him surviving, but left your petitioner, the sole surviving wife and widow of him, the said Chas. Cox, dec'd; that said deceased left neither fathe- nor mother him surviving, and that under the law your petitioner is entitled to sue said defendant- and recover damages for the death of her husband, the said Chas. Cox, dec'd. Petitioner avers that on account of the gross negligence, misconduct, and car-les-ness and reck-
les-ness of said receivers, their agents and employees, said Chas.
8 Cox was injured as aforesaid and *all* accounts of the above-described acts of negligence, car-les-ness, misconduct, and

reckles-ness of said defendants, and that said deceased *being* injured as aforesaid all from and on account of said injuries received as aforesaid, all from and on account of the aforesaid acts of gross negligence, misconduct, and careles-ness of said receivers; that after said Cox, deceased, was injured as aforesaid he was taken — the depot of said receivers and laid upon the floor and allowed to r-main there without any attention whatever until the said deceased, Cox, died from said injuries; that said receivers, through their agents, would not send for a competent doctor to attend to said Cox, deceased, but permitted him to die without any proper at-ention. Petitioner avers that said Chas. Cox, deceased, was the lawful husband of your petitioner and he left her as his lawful surviving wife and widow.

Petitioner avers that at the time of the death of said deceased, Chas. Cox, he was earning the sum of one hundred and fifty dollars per month and the sum of eighteen hundred dollars per annum; that he was a strong, robust, healthy fellow, twenty-eight years old, and would have lived forty years longer, and he would have earned in the years to come that he was deprived of on account of *of* the acts of the said receivers above stated a much larger *some* of money than he was earning when killed; that said Chas. Cox was the sole support of petitioner, *constituting* to the support of petitioner
9 annually the sum of twelve hundred dollars. Petitioner avers that she, as the surviving wife of said deceased, is entitled to, both under the laws of Louisiana and Texas, *to* recover damages for the wrongful acts of defendant- in producing the death of said Chas. Cox, deceased, and that said Cox, deceased, after his injuries were received, suffered most terrible mental and physical pain from the time he was injured until he died.

Wherefore, the premises considered, petitioner sues and avers that a cause of action hath accrued to her — which this court has jurisdiction, and that on account of the *of the* aforesaid allegations and facts above set forth she has been very greatly damaged, to wit, in the sum of fifty thousand dollars actual damages; that defenda-t- have an agent representing them in the county of Marion, State of Texas; wherefore petitioner sues said defendant, in their capacity as receivers of said railway and prays that said receivers be cited according to law to answer this petition, and that on final hearing that she have her judgment for her said actual damages in the sum of fifty thousand dollars against said receivers, for cost of suit and for general and special relief, ansd she will ever pray, &c.

ALEX. POPE,
Attorney for Petitioner.

(Endorsed:) Mrs. Ida May Cox *vs.* John C. Brown & Lionel A. Sheldon, receivers of the Texas and Pacific Railway Co. Original petition. Filed September 3rd, 1887. W. E. Singleton, cl'k.

10 *Citation.*

U. S. C. C. No. 280.

UNITED STATES OF AMERICA, }
Eastern District of Texas, at Jefferson. }

Citation in circuit court.

The President of the United States to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to summon J. C. Brown and Lionel A. Sheldon, receivers of the Texas and Pacific Railway Company, by service upon the local agent of said receivers at Jefferson, Texas, a resident citizen of the county of Marion, in the eastern district of Texas, if to be found therein, to be and appear before the honorable circuit court of the United States at court to be holden in and for said district at Jefferson, on the second Monday, being the twelfth day, of September, A. D. 1887, to answer the petition and complaint of Mrs. Ida May Cox, a *feme sole*, a citizen of the county of Harrison, State of Texas, — plaintiff exhibited and filed in said court on the 3rd day of September, A. D. 1887 (the file number of said suit being U. S. C. C., No. 280), against John C. Brown and Lionel A. Sheldon, receivers of the Texas and Pacific Railway Company, defendants, of which petition you will serve the said local agent of the said defendants at Jefferson, Texas, with the accompanying certified copy, and also with a true copy of this writ. The nature of plaintiff's demand is as follows, to wit: A suit for damages in the sum of fifty thousand dollars, actual damages for the killing of Chas. Cox, husband of plaintiff, on the line of defendants' railway between
11 Marshall and New Orleans, on the 6th day of January, 1887, at Boyce, for cost of suit and for general and special relief. Herein fail not, but have you then and there before said court this writ, with your return thereon showing how you have executed the same.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court hereto affixed, at Jefferson, this the 3rd day of September, A. D. 188–, and the year of our Independence the 111th year. Issued same day.

[L. S.]

W. E. SINGLETON,
Clerk of the U. S. Circuit Court, Eastern District of Texas, at Jefferson,
By RAYMOND HERZ, *Deputy.*

Came to hand September 3rd, 1887, and executed the same day at Jefferson, Texas, by delivering to S. J. Graham, local agent of the receivers of the T. & P. R'y at Jefferson, Marion county, Texas, in person, a true copy of this writ; also a true copy of plaintiff's petition certified to by the clerk of this court.

R. B. REAGAN,
U. S. Marshal,
By W. H. OWEN, *Deputy.*

12 Endorsed: U. S. C. C. No. 280. U. S. circuit court, E. D. T., at Jefferson. Ida May Cox *v.* John C. Brown & Lionel A. Sheldon, receivers. Citation for local agent of defendants at Jefferson, Marion county. Issued third day of September, A. D. 1887. W. E. Singleton, clerk, by Raymond Herz, deputy. Returned and filed fifth day of September, A. D. 1887. W. E. Singleton, clerk, by Raymond Herz, dep'y.

13 *Answer.*

U. S. Circuit Court, E. D. T., at Jefferson.

IDA MAY COX
vs.
BROWN & SHELDON, Receivers.

Now comes the defendant-, Brown and Sheldon, and demurs to plaintiff's petition, and says the same shows no cause of action because—

1st. Said petition does not show that this court has jurisdiction of the cause as between the plaintiff and defendant-; it does not show jurisdiction of the persons.

2nd. Said petition does not set out a cause of action, because it shows that Chas. Cox, the husband of plaintiff, was killed in the State of Louisiana and not in the State of Texas.

3rd. Defendants deny each and every allegation in said petition and say they are not guilty of the wrongs charged against them.

And that the deceased, Chas. Cox, was himself guilty of negligence, contributing to and causing his death, and he was hurt by a mere accident, and he assumed the risk of being hurt by such accidents; wherefore plaintiff cannot recover.

F. H. PRENDERGAST,
Attorney for Defendant-.

[Endorsed:] Ida May Cox *vs.* Brown & Sheldon. Answer. Filed September 12th, 1887. W. E. Singleton, clerk.

14 *Amended Petition.*

THE STATES OF TEXAS:

In the United States Circuit Court for the Eastern District of Texas, at Jefferson, to the February Term, A. D. 1888.

Mrs. IDA MAY COX
vs.
BROWN & SHELDON, Receivers of the Texas & Pacific R'y Co.

And now comes the plaintiff in the above suit and, leave of the court being first had, files this her amended petition and amending her original petition filed herein as follows: Plaintiff avers that *the* on the 16th day of December, 1885, the Texas and Pacific Railway Company — a railroad corporation and common carrier of freight and

passengers for hire in the States of Texas and Louisiana and owning and operating a line of railway from the city of New Orleans, in the State of Louisiana, on to the State line and on through the State of Texas and from the city of Marshall, in the State of Texas, on to the city of Texarkana, Texas, on via the city of Sherman, Texas, to the city of Fort Worth, in the State of Texas, and that on said 16th day of December, 1885, said Texas and Pacific Railway Company was in possession of all of said lines of railway, and that on said day the Missouri Pacific Railw-y Company, a railroad corporation duly incorpor-ted, filed its bill in equity at the city of New Orleans, in the State of Louisiana, in the United States circuit court in and for the fifth circuit, which fifth circuit embraced all of the State of
15 Texas, against t-e Texas and Pacific Railway Company, and said United States circuit court did, on 16th day of December, 1885, make it- order in said suit against said Texas and Pacific Railway Company, appointing receivers of said Texas and Pacific railway, together with all of its properties of each and every kind, and at the same time appointed John C. Brown and Lionel A. Sheldon as receivers of said Texas and Pacifice railway and all of its said lines of railway, both in the States of Texas and Louisiana, and all of its properties in said States, and placed all of the same in the hands of the receivers; and the said Brown and Sheldon qualified at once and entered upon their duties as such receivers of all of said lines of railway and all of said properties, and that by an order made by the honorable U. S. circuit court in and for said fifth circuit court the said order appointing said Brown and Sheldon receivers as aforesaid of said properties was entered at the city of Jefferson, in the honorable U. S. circuit court in and for the fifth circuit, in the eastern district of Texas, in the suit of The Missouri Pacific Railway Company *vs.* The Texas and Pacific Railway Company, and the appointment of said Brown and Sheldon as receivers of said Texas and Pacific railway and all of its lines of railway and of all of its properties was duly confirmed; and this honorable U. S. circuit court, at the city of Jefferson, was given auxiliary jurisdiction of said receivers of said properties, and that said Brown and Sheldon were in the possession an- operating all of said lines of railway and controlling the same as common carriers of freight and
16 passengers for hire; and on the 6th day of January, 1887, said Brown and Sheldon, as receivers of all of said lines of railway an- all of said properties, were operating the same, and that said Chas. Cox went to couple together some cars, as was his duty to do, and that the draw-head an- coupling pin were not suitable for the purposes for which they were being used, in this, that the holes in the draw-heads of said cars were rou-d and the pins that were used in making the coupling were flat or the holes were flat and the pins round—one or the other—which one plaintiff is unable to say; that said pins *was* very hard to pull out or to get out, and it was necessary to get the pins out of the holes of the draw-heads in order to couple the cars together; that said pins could not be gotten out of the holes by the hand, but force had to be used in order to make the coupling that said Cox was trying to make when he was hurt

and from the effects of said injuries said Cox died on said 6th day of January, 1887; that said injuries to said Cox, deceased, were occasioned by the negligence of said receivers, their agents and employees, and without any fault on the part of said Cox; that said Cox did not know anything about the defective condition of any of said cars nor of said tracks, but believing that they were all right, as he had a right to have them; that on account of said negligence and careles-ness of said receivers, their agents and employees, said Cox was injured as aforesaid, and that from the effects of said
17 injuries said Cox did, on the 6th day of January, 1887, die. Plaintiff avers that said Cox, deceased, was injured, and that he died in the State of Louisiana, and that under the laws of Louisiana she is entitled to recover of said receiver damages by reason of the negligence of s-id receivers as aforesaid, and that the laws of Louisiana are substantially the same as the law of Texas, and allows a recovery against said receivers by her for the death of her husband; that the laws of th- State of Louisiana are *as* substantially as follows:

An act to amend and re-enact article No. 2315 of the Civil Code.

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, that article two thousand two hundred and fifteen (2315) of the Civil Code be amended and be re-enacted so as to read as follows:

Article 2315. "Every act whatever of a man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these in favor of the surviving father and mother or either of them for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of th- parent or child or husband or wife, as the case may be."

That said Cox got hurt, to wit, Janu-ry 6th, 1887, and that said Cox, after he was injured by said receivers, their agents
18 and employees as aforesaid, suffered very great mental and physical pain for about twenty-four hours, and that said Cox left no child nor descendant of a child him surviving, nor did said Cox, deceased, leave any father or mother him surviving, but that plaintiff is and was at the date of the death of said Cox, dec'd, the sole surviving wife of said Cox, deceased, and, as such widow, she has been damaged in the sums and in the manner aforesaid, as stated in her original petition, and that by the death of s-id Chas. Cox, deceased, she, as surviving wife, has sustained in addition all of the damaged st-ted in her original petition, and that by the death of said Chas. Cox, deceased, she, as surviving wife, has sustained, in addition to the damages set forth in her original petition, the following additional damages: that she lost his society and the care and support of her said husband, and that she suffered other great damages; that she had to pay his funeral expenses, and that she has

sustained other — than those set forth in her original petition in the sum of ten thousand dollars, which she sues for in addition to the damages claimed in her original petition, and prays for judgment for same; that said receivers are subject to the jurisdiction and under the control of this honorable court, and that t-ey were w-thin its jurisdiction when this suit was brought; that said Brown, as receiver aforesaid, and said Sheldon, as such receiver, had their agent and representative residing in Marion county, where this suit is filed, and that said U. S. circuit court has jurisdiction to try and determine this cause of action; that said defendants have waived their plea to the jurisdiction of this court by making an
19 agreement in this case, which agreement is in writing and signed by the duly authorized attorney of record for defendants, to wit, F. H. Prendergast, and which agreement is now on file among the papers in this case; that said defendants let said case go over one term of this court without presenting their plea to the jurisdiction of this honorable court, and agreed in writing that said case at the last term of this honorable court should not be called and tried until an agreement was entered into between the parties to this suit, and said agreement is on file among said papers in this suit, and is here referred to and made a part of this petition. Plaintiff avers that under the laws of the United States of America this honorable court has jurisdiction of this suit, both of the subject-matter and of the person of both of said defendants as said receivers of the Texas and Pacific railway, and she prays this honorable court to take jurisdiction of both the subject-matter and the persons of said receivers, defendants in this suit, and that on final hearing hereof that she have judgment against said receivers as said receivers of the Texas and Pacific railway for the full amount of her damages as al-eged in her pleadings and for judgments for all costs of suit, and that your honor make an order about the payment of the judgment she may recover against the said receivers; that said receivers be ordered to pay the judgment that plaintiff recovers against them in this suit out of any of the net earnings in their hands of said properties placed in their hands as re-
20 ceiver- as aforesaid *as* plaintiff executing the proper receipt therefor to said receivers for said judgment that said plaintiff may recover against them in this suit; and plaintiff prays for all other and general and special relief that she may be entitled too both in law and equity; and she will ever pray, &c.

ALEXANDER POPE,
Att'y for Plaintiff.

(Endorsed:) Ida May Cox *vs.* Brown & Sheldon. Amended petition. Filed February 16th, 1888. W. E. Singleton, clerk.

21 *Supplemental Answer.*

IDA MAY COX
vs.
BROWN & SHELDON.

FEBRUARY, 1888.

Now comes defendant- and in reply to plaintiff'- amended petition say:

1st. That plaintiff's cause of action as set up in said amended petition accrued more than one year before the filing of said amended petition; wherefore the cause of action set up in said amendment is barred by the *lswa* laws of limitation of the States, both of Louisiana and Texas. Wherefore plaintiff cannot recover on said amendment.

Defendants deny each and every allegation in said amendment and repeat their allegations in their original answer.

F. H. PRENDERGAST,
Att'y for Defendant-.

(Endorsed:) No. 280. Ida May Cox *vs.* Brown and Sheldon. Supplemental answer. Filed February 16th, 1888. W. E. Singleton, cl'k.

22 *Bill of Exceptions as to Jurisdiction.*

IDA MAY COX
vs.
BROWN & SHELDON.

FEBRUARY 16TH, 1888.

Be it remembered on this day came on to be heard defendants' exceptions in above case, filed September 12th, 1887, which excepceptions are as follows:

1st. Said petition does not show that this court has jurisdiction of the cause as between the plaintiff and defendant; it does not show jurisdiction of the person-.

2nd. Said petition does not set out a cause of action, because it shows that Chas. Cox, the husband of plaintiff, was killed in the State of Louisiana and not in the State of Texas.

And the court, after hearing argument, overrules said exceptions; to which ruling the defendant excepted and tenders this his bill of exceptions and prays same be allowed.

Allowed. Given under my hand and seal.

CHAUNCEY B. SABIN,
Judge for the Eastern District of Texas.

Requested by F. H. Prendergast, defendants' attorney.

(Endorsed:) Bills of exception. Filed February 16th, 1888. W. E. Singleton, clerk.

23 *Defendant's Bill of Exceptions.*

In the United States Circuit Court for the Eastern District of Texas, at Jefferson.

IDA MAY COX
vs.
JOHN C. BROWN, Receiver.

Be it remembered that on the trial of the above cause, on February 16th, 1888, and on the 13th and 14th and 15th days of September, 1888, the following proceedings were had:

The defendant demurred to plaintiff's petition for the following reasons:

1st. Said petition does not show that this court has jurisdiction of the cause as between the plaintiff and defendant; it does not show jurisdiction of the persons.

2nd. Said petition does not set out a cause of action, because it shows that Charles Cox, the husband of plaintiff, was killed in the State of Louisiana and not in the State of Texas.

On February 16th, 1888, the court overruled said demurrer, and the defendant excepted to the sai- ruling of the court; and the defendant further demurred to plaintiff's amended petition filed February 16th, 1888, for the following reasons:

1st. That the plaintiff's cause of action as set up in said
24 amended petition accrued more than one year before the filing of said amended petition; wherefore the cause of action set up in said amendment is barred by the laws of limitation of the States both of Louisiana and Texas. Wherefore plaintiff cannot recover on said amendment.

On September 13th, 1888, the court overruled said demurrer, and the defendant excepted; thereupon the following facts were proven:

Testimony of Ida May Cox.

The plaintiff, IDA MAY COX, testified that she was married to Chas. Cox in September, 1886, and lived with him as his wife till the day of his death, January 6th, 1887.

That Chas. Cox was run over and killed by a train of the Texas and Pacific railway at Boyce, in the State of Louisiana, on January 6th, 1887. At the time he was killed he was in the employ of Brown and Sheldon, receivers of the Texas and Pacific railway, as conductor of a freight train, and he received as his wages one hundred and fifty dollars per month, and that he gave a hundred dollars per month for her own use. Said Chas. Cox left no father nor mother or child surviving him, but -eft plaintiff as his surviving wife.

Testimony of Scott Anderson.

SCOTT ANDERSON testified for plaintiff:

I saw Chas. Cox and hour and a half after he was hurt. He was

lying on the floor, at the depot. His left leg was crushed from six inches above the ankle to above the hip joints. Dr. Dunn was called, but gave him nothing but morphine and brandy. He lived about five or six hours. He was perfectly rational when I saw him; he tried to tell me something about a pin and a brake not being set on the caboose.

There were no ties surfaced up in the yard, except at switch stands, frogs, and road crossing.

25 The condition of the place where Cox got hurt was grass growing over the ends of the ties. There was about three or four inches of snow on the ground. The ties were not surfaced up all over the yard limits. At some places Bermuda grass was very thick, but at the spot where he was hurt I do not know the exact condition of the track; some places were worse than others. He got hurt at night between 8 and 10 o'clock, and the night was very dark. The yard has since been raised from two to five feet and new ties put in and filled up—this was done in 1887—and has been surfaced up since Cox was killed. I am a railroad man of twelve years' experience. It is much safer for a person who has to couple cars for the ties to be surfaced up both inside and outside the rails. In a yard the track should be surfaced over. The ties in track of yards I have seen were generally filled to the top of the ties. On all first-class railroads the ties at stations where switching is done is surfaced up with earth or something else.

If the ties are not covered a person's foot is liable to go between the ties when making a coupling, and especially in the night, and he is in great danger of being caught. There is always danger in coupling cars up, but the danger is lessened by having the ties surfaced over. The ties on the outside of the iron rails where Cox was hurt were not covered over or surfaced up with earth or anything else. They are now surfaced up and in first-class condition to what they were when Cox was hurt. The general condition of the road-bed of defendant at place were Cox was hurt was bad. The

26 ties were not covered over, and now they are covered over with earth. He was 29 years old and hardy robust man; was strictly temperate, never drank. The character of the ground where Cox was hurt was snowy and slippery. There was dirt in the centre between the ties, leaving the ends of the ties exposed, and a person coupling cars was liable to have his foot caught between the ties.

The spaces under the iron rails should be filled to within an inch of the iron. If the ties were surfaced over his feet are in no danger of getting caught. In coupling cars a man can go to the cars that is still and wait for the car to be pushed to him.

Cox worked about two years as brakeman and conductor on the New Orleans Div. of the Texas and Pacific Railway.

Testimony of S. P. McNeese.

S. P. McNeese, for plaintiff, says he knew Cox and how he was hurt; saw him at Boyce an hour after he was hurt. His leg was

hurt up here where it joins the body. Cox was rational and made a statement as to how he was hurt. He was under influence of whiskey and morphine when he made the statement and suffering very much; said he was trying to make a coupling when he got hurt.

27 It was on the side track at Boyce that he got hurt and it was in the yard limits. The railway yard at Boyce was in charge of the defendants as receivers. I examined his left boot and found it dented in just above the spur piece; the place looked as if it had been caught by something and dented in. The cross-ties were not surfaced up to the top of the ties only in the inside of the track or ties. There was no regularity about the distance between the cross-ties; some were six inches and some were sixteen to twenty inches apart. They had only a little dirt in the inside. There was nothing covering said ties all over. The ties should have been surfaced up. It was a cloudy, dark night; no stars, no moon. The yard has been newly repaired since Cox was hurt, and tra-k surfaced up. It is safest to have the ties surfaced up. A R. R. yard, where switching is done, is not complete until the ties are all surfaced up. It is much safer and more suitable for railroading to have the ties covered over*ed* in yards where switching is done, and all first-class roads have their yards fixed this way. The ties on outside of the rail were simply laid on the ground and no earth put in between them. The road-bed was in poor condition and not suitable and unstable for the purposses of a road-bed at the time Cox was hurt, and was not safe. His death was caused by being run over by a car in yard at Boyce. He was trying to make a coupling of his train together when he was hurt.

28 It is true that in order to make a track safe and suitable for railroading that the ties should be co-ere- over in and outside of the iron rails and it — safer for a person making a coupling of cars that the ties where he has to go should be covered over with — both inside and outside the iron rails. A person coupling cars *go* has to go between and walk over the ties, and he is much more liable to be hurt and in much greater danger when coupling when the ties are unsurfaced than if the ties were surfaced over with earth in and outside the iron rails. All railroad yards are not considered complete until*l* all of the ties are all covered over with earth or something else, and all places where a good deal of switching is done have their ties surfaced over and are not complete and safe until it is done. Persons in coupling cars stand with one foot on the inside of the rail and the other on the outside and has to walk over the ties on the outside of the rail. The ties should be covered over. There is a great deal of danger in coupling cars where the ties are unsurfaced. I do know that the ties were not covered over or surfaced up on the outside of the iron rails at the place where Cox was hurt with anything. At the time Cox was hurt they were unsurfaced at the place and time Cox was hurt, save a little dirt in the middle of the track. The ties were simply laid on the ground and iron rails on ties, and there was nothing filling in the spaces *in* between the ties where Cox was hurt. I do know that the road-bed of defendants at the place where Cox got

hurt and in that vicinity was in a very bad condition at the time Cox got hurt. Some of the ties were rotten at the time and
29 place Cox got — and the road-bed needed repairs. There was nothing at the place Cox got hurt that would prevent his feet from going in between the ties, and that fact made the danger much greater when coupling up cars and his feet would be in greater danger of being caught under the iron rails between the ties and the danger would be much greater in coupling cars. Cox was well and sound just before he was hurt.

Testimony of Sam. Patterson.

SAM. PATTERSON, for plaintiff, testified:

Cox was trying to couple the train up when he was hurt. One of the cars to be coupled was a P. C. & St. L. car, with a wrought-iron draw-head, with a round pin-hole and a flat pin fast in it. The draw-head had to be raised and the pin had to be hammered out to make the coupling. This I did after Cox was hurt. I examin*de* the draw-head and pin after Cox was hurt. Cox was hurt at Boyce, *and* the part of the defendant's railway called the main line of the N. O. Div. The ties were not surfaced up at the place Cox got hurt. There was dirt thrown on the ties in the middle of the track, but in no other places. Their condition was the same in whole of Boyce yard when Cox was hurt. Th*y*re was no grass. It was winter time. All the ties in Boyce yard have been surfaced up since Cox was hurt. It is safer to have the ties surfaced up. The ties at the place Cox, dec'd, got hurt were not surfaced up with anything. There was a little dirt over them in the middle of the
30 track, but nowheres else. There was nothing filling in in the spaces between ties nor under the iron rails.

It was proven that the condition of the road-bed at the place where Chas. Cox, dec'd, was injured at the time he was hurt was as stated in the evidence of the witness S. P. McNeese.

Testimony of Albert Kneggs.

ALBERT KNEGGS, for the defendant, testified:

I was night inspector of cars at Boyce yard when Cox was hurt. It was about 9.50 o'clock p. m. I was inspecting *same* cars on the track next to the one — which Cox was hurt. I heard him give three screams. The train was moving about two miles per hour. There was about one inch of snow on the ground. The track was filled in the centa*re*. There were tracks showing that Cox was walking backwards trying to pull the pin when he got hurt. I examined the draw-heads of the two cars that Cox was trying to couple and found them in good fix. The ties where Cox was hurt was covered in the centre sloping towards the rails to let the water run off. The spaces between the ties on the outside of the rails were not filled up. The track on which Cox was coupling cars was filled in the centre. I considered the Boyce yard in good condition. The iron was good.

The track where Cox was hurt has been taken up since Cox got hurt. In making a coupling a man should walk on the outside of the ties until the car- comes within a foot of each other, then
31 step in and make coupling. He don't need to walk backwards to make a coupling. It is against the rules of the company to walk backwards. He has no business to walk between the ties. It is a great deal safer to a person making a coupling that the ties be surfaced up, but there must be a space *on* the water to run off. There is a hand-hold on the outside of each car for a person to catch hold of and walk along and step in and make a coupling. The track and ties where Cox made the coupling is all moved away now. I saw the car immediately after Cox was hurt. One of the draw-heads was wrought iron and had a round hole and a flat pin; the other had a cast-iron draw-head and a flat hole and a flat pin in it and a link.

I was standing by when Mr. Phillips shook the draw-head and pulled the pin out; he used nothing to get the pin out; it was a flat pin in wrought-iron draw-head; generally, I think, flat and round pins are used when they will fit.

I examined the brakes then and there and found them in good fix; the yard is moved to another place to where it was when Cox was hurt.

Testimony of Geo. W. Phillips.

G. W. PHILLIPS testified for the defendant:

I was engineer of the train when Cox was hurt; I was backing my train up to couple a crossing—preparing to leave the station; after the cars came together I heard some screaming and reversed my engine and pulled my train apart, surmising that one was
32 caught between the cars; after pulling my train apart I stopped the engine and train and went back to see who was hurt; on arriving at the road crossing I found they had taken Cox to the depot; the train was backing up at the rate of two miles per hour; I examined the track and found it in comparitively good condition, the centre ballasted over the ties with dirt ballast; there was about one inch of snow on the ground; I did not notice Cox's tracks, but from appearance he seemed to have been walking backwards, trying to pull the pin to make the coupling; I examined one draw-head; it was in good condition, but the pin in the carr that was backing up was fast in the draw-head; I don't know who made the coupling afterwards, but all the trouble they had was to shak- the pin to loosen it.

I did not see Cox when he got hurt; I did not know he was hurt until he gave the screams; there was nothing in between the ties on the outside of the rails. The yard track at Boyce was not in bad condition; compared with other side tracks the track where Cox got hurt was not unsafe or unsuitable for railroad purposes; a portion of the track from Marshall to Boyce was in bad condition. A man don't have to walk backward to make a coupling; it is safer

to have a track ballasted over entirely, or else he is liable to stub his foot between the ties; I found one — the pins tight in one of the draw-heads, but taking hold of it and shaking it I pulled the pin out; flat pins are made for flat holes, but we frequently use flat pins for round holes when they are small enough.

33 *Testimony of F. H. Prendergast.*

F. H. PRENDERGAST testified for the defendant:

During the year of 1887 and the early part of 1888 the track of defendant road in Louisiana, including Boyce, was raised several feet.

Testimony of J. R. Lee.

J. R. LEE testified for plaintiff as follows:

I am a railroad man by profession and worked several months for defendant. The conductor has nothing to do with the making up of his trains; this is done by yardmasters. It is the duty of a conductor of a freight to couple up his cars and trains just as much as it is the brakeman's. Brakeman are under the orders of a conductor. The defendants have no rule that a person making a coupling should not walk backwards; persons in coupling cars walk either way that they see fit.

Testimony of Joe Keys.

JOE KEYS, sworn for plaintiff, testified as follows:

I railroaded for a great many years; was brakeman of freight trains, conductor of freight trains, yardmaster, &c. In December and January, 1887, I was working for defendants as conductor of freight trains. The defendants didn't have any rule that a person in coupling cars up should not walk backwards. It was as
34 much the duty of a conductor to couple trains as brakemen. I often did it while conductor, and in coupling sometimes walked backwards. I usually walked the way I thought the safest and the best.

The defendants admitted that the defendants were appointed receivers in New Orleans, as alleged by plaintiff; an ancillory bill was filed in this court in the case of The Missouri Pacific Railway Co. *vs.* The Texas and Pacific Railway Co., being equity bill number 16 in this court, and this was done by order of Judge Don A. Pardee, the U. S. circuit judge, who appointed the receivers, and he made an order giving this court ancillory jurisdiction of that cause.

Defendants admitted that the defendants were receivers of the Texas and Pacific railway, as alleged in plaintiff's pleading, with powers as therein alleged.

35 No. 71.

An act to amend and re-enact article 2315 of the Civil Code.

SECTION. Be it enacted by the General Assembly of the State of

Louisiana that article two thousand three hundred and fifteen (2315) of the Civil Code, be amended and re-enacted so as to read as follows: Article 2315, Every acts whatever of man that causes damages to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the surviving minor children or widow of the deceased, or either of them, and in default of these, in favor of surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife as the case may be.

H. W. OGDEN,
Speaker of the House of Representatives.
CLAY KNOBLOCK,
Lieut. Governor and President of the Senate.

Approved 10th July, 1884.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy of the original.

OSCAR ARROYO,
Secretary of the State.

36 And upon the close of the evidence the defendants requested the court to charge the jury as follows:

IDA MAY COX
vs.
JOHN C. BROWN, Receiver.

Special Charge No. 1.

In this case there is no evidence that the defect in the track caused the death of Chas. Cox, nor is there any evidence that the defect in the draw-head caused the death of Chas. Cox.

There being no evidence of any negligence on the part of the defendants, you will therefore return a verdict for the defendant.

Requested by F. H. Prendergast, for the defendant.

(Endorsed:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which charge the court refused to give; to which the defendant excepted.

37 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 2.

That the burden is on the plaintiff to prove—

1st. That the defendant was negligent in leaving the track in bad fix or in leaving the draw-head in bad condition.

2nd. That the bad condition of the track or the draw-head caused the injury to Cox.

3rd. That Cox was not guilty of negligence which contributed to or caused the injury.

Plaintiff cannot recover unless she has proved the above facts.

Requested by F. H. Prendergast, for defendant.

[Endorsed:] Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which charge the court refused to give; defendant excepted to said refusal.

38 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 3.

If Chas. Cox knew the condition of the track at Boyce, where he was hurt, and with a knowledge of the facts went in between the cars to make the coupling, then plaintiff cannot recover on account of the defects in the track.

Requested by F. H. Prendergast, attorney for defendant.

(Endorsed:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which charge the court refused to give, and defendant excepted to said refusal.

39 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 4.

The fact the track was defective where Cox was hurt would not make defendant liable unless such defect in the track caused the injury.

Nor would the defect in the draw-head make defendant liable unless such defect caused the injury.

Requested by F. H. Prendergast, for defendant.

(Endorsed:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which charge the court refused to give, and defendant excepted to said refusal.

40 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 5.

If the jury believe that Chas. Cox went in between two cars to couple them and in doing so was killed, then, in order for plaintiff to recover, it must appear that it was a part of Chas. Cox's duty to couple cars together in order to entitle plaintiff to recover. If you are not satisfied from the evidence that it was Chas. Cox's duty to couple the cars you must find for the defendant.

Requested by F. H. Prendergast, for the defendant.

(Endorsed:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which the court refused to give; to which refusal the defendant excepted.

41 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 6.

If the fact that Chas. Cox went in between the cars at the time and place he did contributed to or caused the injury to him, then plaintiff cannot recover.

Requested by F. H. Prendergast, for defendant.

(Endorsed:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which the court refused to give; to which refusal of the court the defendant excepted.

42 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 7.

The mere fact that Chas. Cox, the husband of plaintiff, was injured while in the service of the defendant is not sufficient to entitle plaintiff to recover.

But it must be shown by the evidence that some neglect of duty on the part of the defendant caused the injury to Chas. Cox, and that said Cox was himself free from fault.

Requested by F. H. Prendergast, for defendant.

(Endorsde:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which the court refused to give; to which refusal of the court the defendant excepted.

43 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 8.

The mere fact that there was a defective track or a defective drawhead to one of the cars, and also the fact that Chas. Cox was injured, is not sufficient for the jury to conclude that the defects aforesaid caused the injury; but there must be facts proven going to show that one of said defects caused the injury.

Requested by F. H. Prendergast, att'y for defendant.

(Endorsde:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which charge the court refused to give, and defendant excepted to said refusal of the court.

44 And the defendant further requests the court to charge the jury as follows:

Special Charge No. 9.

The defendant does not owe to the employees the duty to keep it yard ballasted up even with the top of the ties, but its duty is to keep its yard reasonably safe for the usages to which they are subjected. If the jury believes that the yard at Boyce, where Cox was killed, was in reasonably safe condition, then the fact that the spaces between the ties were not filled up with earth clear out to the end of the ties would not be negligence entitling plaintiff to recover.

Requested by F. H. Prendergast, for defendant.

(Endorsed:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which charge the court refused to give; to which refusal of the court the defendant excepted.

45 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 10.

There is no proof that any negligence of the defendants caused the flat pin to be put in the draw-head instead of a roun- one.

You cannot find for plaintiff on the ground that it was negligence to have a f-at pin instead of a round one.

Requested by F. H. Prendergast, for defendant.

(Endorsed:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which charge the court refused to give, and the defendant excepted to said charge of the court.

46 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 11.

That the conductor and other person in charge of the train are all fellow-servants, and neither of them can recover for or on account of the negligence of the other.

Requested by F. H. Prendergast, att'y for defendant.

(Endorsed:) Filed September 15th, 1888. W. E. Singleton, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which charge the court refused to give, and the defendant excepted to said refusal.

47 And the defendant further requested the court to charge the jury as follows:

Special Charge No. 12.

If Chas. Cox knew the condition of the track in the yard at Boyce when he went in to make the coupling, or if he might have known its condition by ordinary care and caution, then plaintiff cannot recover.

Requested by F. H. Prendergast, att'y for defendant.

(Endorsed:) Filed September 15th, 1888. W. E. Singlteon, clerk.

Refused September 15th, 1888.

C. B. SABIN,
U. S. District Judge.

Which charge the court refused; to which the defendant excepted.

48 The jury returned a verdict for plaintiff for fifteen thousand dollars on September 15th, 1888, and on same day defendant filed a motion in arrest of judgment for the following reasons:

IDA MAY COX
vs.
J. C. BROWN, Receiver. } Motion in Arrest of Judgment.

1. Now comes the defendant and moves the court to arrest the judgment in this case because the petition herein does not show that this court has jurisdiction of the parties for the reason that the petition shows that the plaintiff resides in Texas and the defendant, John C. Brown, lives in Dallas county, Texas.

2nd. The petition shows no cause of action, because the said Chas. Cox was killed in the State of Louisiana; wherefore the plaintiff shows no cause of action of which this court has jurisdiction and the court erred in overruling the demurrer.

F. H. PRENDERGAST
Att'y for Defendant.

(Endorsed:) Ida May Cox *vs.* John C. Brown, receiver. Motion in arrest of judgment. Filed September 15th, 1888. W. E. Singleton, clerk, by R. Herz, deputy.

49 Which motion was continued until October 11th, and on that day the court overruled said motion and defendant excepted; and on September 15th decendant filed a motion for a new trial for the following reasons:

IDA MAY COX
vs.
JOHN C. BROWN, Receiver. } Motion for a New Trial.

Now comes the defendant and moves the court to set aside the verdict of the jury and grant the defendant a new trial for the following reasons:

1st. The court erred in refusing the special charges asked by the defendant, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

2nd. The verdict is excessive in amount.

3rd. The verdict is contrary to the evidence in this, there was no evidence that any act of negligence on part of defendant caused the death of Chas. Cox.

4th. The verdict is contrary to the evidence in this, the burden was on plaintiff to show that Chas. Cox was in the exercise of due care, and there was no evidence on this point.

5th. The court erred in overruling the demurrer, as shown by bills of exceptions No. 1.

F. H. PRENDERGAST,
Att'y for Defendant.

(Endorsed:) Motion for a new trial. Filed September 15th, 1888. W. E. Singleton, clerk. R. Herz, deputy.

50 And October 12th the court overruled the motion for a new trial, except that he held the verdict to be excessive in amount, and stated that he would give a new trial unless the plaintiff remitted ($5,000.00) five thousand dollars of the verdict.

Thereupon the plaintiff remitted, on October 12th, 1888, five thousand dollars of the judgment; and the court thereupon, on October 12th, 1888, overruled the motion for a new trial; to which ruling the defendant excepted.

The foregoing bill of exceptions examined by me and allowed in open court this 17th day of October, 1888, and during the September term of said court.

Given under my hand and seal this the 17th day of October, A. D. 1888.

CHAUNCEY B. SABIN, [SEAL.]
U. S. District Judge for the Eastern District of Texas.

(Endorsed:) Final bill of exceptions. Filed October 17th, 1888. W. E. Singleton, clerk. R. Herz, deputy.

51 *Charge of the Court.*

In the United States Circuit Court for the Eastern District of Texas.

Mrs. IDA MAY COX
vs.
JOHN C. BROWN & L. A. SHELDON, Receivers. } No. 280.

GENTLEMEN OF THE JURY: If you shall find from the evidence that the road-bed of the defendants was unsafe and dangerous, at the time and place where Chas. Cox lost his life, for employees to couple cars, or that the coupling pin on the car which he had disengaged and use- was unsafe and dangerous for use by reason of its being square and the hole to which it was to be used being round, and that Charles Cox, the then husband of plaintiff, was ignorant thereof, and, being then and there and employee of defendants while engaged in coupling cars of a train whereof he was conductor, lost his life by reason of either or both of the above causes, then you will find for the plaintiff in such sum as will compensate her for the pecuniary loss of her husband, taking into view their circumstances in life, taking into consideration the *the* probable pecuniary benefits that would have enured to her had he lived, whereof you have to form the estimate according to the best light which your

reason and experience may — afforded you and the testimony may have furnished.

The average age of human life and the insurance tables of expectancy are simply aid- to your judgment, but are not conclusive upon your judgment, your reasonable common sense, and
52 the evidence must form the estimate of the amount of loss.

On the other hand, if you shall find either that the road-bed was not unsafe or dangerous, although not of the best character, or that the coupling pin used was not unsafe or dangerous, although not as well adapted for use as round pin, then you will find for defendant.

And, again, if you shall find from the evidence that both the road-bed and coupling pin were unsafe and dangerous, yet if you shall find from the evidence that neither of these causes resulted in the death of Chas. Cox nor were the proximate causes producing the injuries whereof he died, then you will find for the defendant.

It is incumbent on the plaintiff before she can recover not only to prove that defects complained of existed, but also that they or one of them were the cause of death.

If the death was the result of accident, misadventure, or the want of care or prudence on the part of deceased or other cause not complained of, plaintiff cannot recover.

You must ascertain the true nature of the case and the actual cause of death from the evidence as adduced before you and render your verdict in accordance therewith.

Sept. 15th, 1888.

C. B. SABIN,
U. S. District Judge for the Eastern District of Texas.

53 *Judgment.*

IDA MAY COX
vs.
JOHN C. BROWN *et al.*

SEPTEMBER 13TH, 1888.

This, day this cause coming on for trial, came the plaintiff in person and by attorney, and the defendants, by attorney, appeared, and all parties announced ready for trial.

Then came a jury of twelve good and lawful men, to wit, J. H. McClemmons, J. B. Whitfield, Whit. Phillips, Archer Campbell, J. L. Jolly, Will. Dixon, J. M. Baker, J. D. Rogers, M. J. Smith, G. W. Watson, T. M. Shackleford, & J. D. Lyon, who were duly tried, empanelled, and sworn to try this cause.

Part of the testimony being heard, court adjourned and the jury permitted to separate, by consent of both parties, under the charge of the court, and the consideration of the case postponed until to-morrow morning.

54 *Judgment.*

IDA MAY COX
vs.
J. C. BROWN *et al.* } No. 280.

SEPTEMBER 14TH, 1888.

This cause coming this day further on to be heard, came all the parties thereto, and also came the jury herein impanelled and sworn on yesterday.

All of the testimony and part of the argument having been heard, court adjourned and the jury permitted to seperate, by consent of both parties, under the charge of the court, and the consideration of the case postponed until to-morrow morning at 10 o'clock.

55 *Judgment.*

IDA MAY COX
vs.
JOHN C. BROWN & L. A. SHELDON, Receivers of T. & P. R'y Co. } C.L. 280.

SEPTEMBER 15TH, 1888.

Whereas on the thirteenth day of September, A. D. 1888, this cause came on to be heard and all parties announced ready for trial, and the jury was empanelled and sworn according to law to try the issues herein, and on the days thereafter the evidence and part of the argument were submitted, and on this day all of the arguments being concluded and the jury received the charge of the court, the said jury retired from the bar of the court to consider of their verdict, and afterwards, on this same day, returned into open court their verdict in words and figures as follows, to wit:

JEFFERSON, TEXAS, *September 15th*, 1888.

We, the jury, find for the plaintiff and assess the damage at $15,000.00 (fifteen thousand dollars).

J. H. McCLIMONS,
"*Foreman.*"

Therefore it is considered by the court, ordered, and adjudged that the plaintiff, Mrs. Ida May Cox, do have and recover of and from the defendant-, John C. Brown & Lionel A. Sheldon, receivers, as receivers of the Texas and Pacific Railway Company, the sum of fifteen thousand dollars, with interest thereon at the rate of eight per cent. per annum from this day, and *and* all cost in this behalf expended, to be paid in due course of the administration of their receivership.

Further ordered that the officers of this court do have and recover from the parties herein their cost by them respectively
56 incurred.

And it is ordered that a certified copy of this decree be

forwarded by the clerk of this court to the clerk of the United States circuit — of the eastern district of Louisiana, to be filed by him in the papers of said receivership and called to the attention of the court.

57 *Order.*

IDA MAY COX
vs.
J. C. BROWN *et al.* } C. L. No. 280.

OCTOBER 11TH, 1888.

On this day came all parties her-in, by attorney, and then came on to be heard the motion in arrest of judgment herein. The same being argued by counsel, the court is of the opinion that the law is against the motion — doth overrule the same. It is therefore ordered by the court that the motion in arrest of judgment herein be, and the same is hereby, overruled; to which ruling of the court the defendant, by attorney, excepted.

58 *Order.*

Mrs. IDA MAY COX
vs.
JOHN C. BROWN *et al.*

In this cause, in which the motion for a new trial was argued and submitted on October 11th, 1888, the court having expressed the opinion that the verdict was excessive, and that it was willing to let the same stand for ten thousand dollars in case the plaintiff should see fit to remit the sum of five thousand dollars on the amount found by the jury, thereupon this the 12th day of October, 1888, came the plaintiff and filed her remitt-ur thereon in said sum of five thousand dollars, and thereupon the motion for a new trial herein was overruled by the court, and such judgment therein heretofore rendered is permitted and adjudged to be and remain in full force and effect, subject, nevertheless, to the said remitt-ur of five thousand dollars as of the date of the judgment herein; and it is further ordered that a certified copy of this order *to* be certified with the judgment rendered herein in like manner as is directed in the said judgment as to itself, and that both be embraced in the same certificate. Defendant excepted to the ruling of the court in overruling the motion for a new trial.

CHAUNCEY B. SABIN,
U. S. District Judge for the Eastern District of Tex.

(Endorsed:) Order of court as to remitt-ur. Filed October 12, 1888. W. E. Singleton, clerk, by Raymond Herz, deputy.

59 *Remitt-ur.*

THE STATE OF TEXAS, }
County of Marion. }

In the United States Circuit Court in and for th- Eastern District of the State of Texas, Holding Session at the City of Jefferson, in said Eastern District, to the August Term, A. D. 1888.

Mrs. IDA MAY COX }
vs.
BROWN and SHELDON, Receivers of T. & P. R'y. }

And now comes the plaintiff in the above-entitled cause, and the honorable circuit court having intimated its opinion that a new t-ial would be granted in this case on account of the fact that the verdict of the jury was in a to- large amount, and that if the plaintiff would remit the sum of five thousand dollars of the judgment and take the sum of ten thousand dollars that said motion for a new trial would be overruled and not granted, now, therefore, the plaintiff comes and remits the sum of five thousand dollars of the prin*ic*-al amount of the judgment rendered in her case and ask- the court to so reform the judgment in this case that plain- recover of defendants, as rec-ivers, the sum of ten thousand dollars and all cost of suit. Plaintiff request- the court to so order, &c.

ALEXANDER POPE,
Att'y for Plaintiff.

(Endorsed:) Remitt-ur by plaintiff of $5,000.00. Filed October 12th, A. D. 1888. W. E. Singleton, clerk.

60 *Law of Louisiana.*

No. 71.

An act to amend and re-enact article 2315 of the Civil Code.

SECTION. Be it enacted by the General Assemble of the State of Louisiana, That article two thousand, three hundred and fifteen (2315) of the Civil Code, be amended and re-enacted so as to read as follows: Article 2315. Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it; the r-ght of this action shall survive in case of death in favor of the surviving minor children or widow of the deceased, or *y*ither of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife as the case may be.

H. W. OGDEN,
Speaker of the House of Representatives.
CLAY KNOBLOCK,
Lie-t. Governor and President of the Senate.

Approved 10th July, 1884.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy of the original.
[L. S.]

OSCAR ARROYO,
Secretary of the State.

61 *Order of Court.*

In the United States Circuit Court for the Eastern District of Texas, at Jefferson, Texas.

Mrs. IDA MAY COX
vs.
BROWN & SHELDON, Receivers.

Be it remembered the law of Louisiana, of which the foregoing is a copy, was read in evidence by the plaintiff on the trial of the above-entitled cause and should have formed a part of the statement of the plaintiff's evidence in the bill of exceptions signed by me on yesterday, October 17th, 1888, and been included therein, but the same was accident-ly omitted therefrom. I thought of it pending the reading of the bill with some other matters, but forgot afterwards to mention the same until my attention was called thereto by a telegram from the plaintiff's attorney. It ought to have gone in, and it is ordered that the same form a part of said bill of exceptions as a portion of plaintiff's evidence, neither party being present or represented by counsel at the makin- of this order, which is made in term before the adjournment of court.

Given under my hand and seal in open court this the 18th day of October, 1888.

CHAUNCEY B. SABIN, [SEAL.]
U. S. District Judge for the Eastern District of Texas.

[Endorsed:] Mrs. Ida May Cox *vs.* Brown and Sheldon, receivers of the Texas and Pacific Railway Company. Order to in-
62 clude in bills of exceptions the law of Louisiana. Filed October 18th, 1888. W. E. Singleton, clerk.

63 *Assignment of Errors.*

In U. S. Circuit Court, Eastern District of Texas, at Jefferson.

IDA MAY COX
vs.
JOHN C. BROWN, Rec'r.

Now comes the defendant John C. Brown, receiver, who is plaintiff in error, having been allowed by the court to prosecute this writ of error in his own name as receiver, and assigns errors as follows:

I.

The court erred in its ruling on February 16th, 1888, in overruling defendants' demurrer to plaintiff's petition because said petition did not show that the court had jurisdiction over the person. The petition showed that plaintiff lived in Harrison county, Texas, and the defendant John C. Brown lived in Dallas county, Texas, and defendants L. A. Sheldon lived in the State of Louisiana; wherefore there could be no jurisdiction on the grounds of citizenship or residence of the parties.

II.

The court erred in its ruling on February 16th, 1888, in overruling defendants' demurrer to the plaintiff's petition because said petition did not show jurisdiction over the parties. There could be no jurisdiction on the ground of Federal question or the subject-matter, because the petition showed that defendant Sheldon lived in the State of Louisiana and the defendant John C. Brown lived in Dallas county, Texas, which is not in the eastern district of Texas, but in the northern district of Texas, and the defendant must be sued in the district where he resides except where jurisdiction depends on citizenship.

III.

The court erred in its ruling on February 16, 1888, in overruling defendants' demurrer on the ground that Chas. Cox, plaintiff's husband, was killed in the State of Louisiana and not in the State of Texas, and suit being to recover damages occasioned by his death and the law of Louisiana is not the same as the law of Texas on that subject.

IV.

The court erred in its ruling on September 13th, 1888, in overruling the demurrer of defendants setting up limitation to defendants' amended petition. The original petition set up no cause of action, and the amended petition was filed more than one year after the death of the said Chas. Cox, and the amended petition set up *causes* for a recovery and items for damages not contained in the original petition.

V.

The court erred in refusing special charge No. 1, to the effect that the jury must find for the defendant, because there was no evidence that the defect in the track caused the death of Chas. Cox nor and defect in the draw-head that caused the death of Cox.

VI.

The court erred in refusing to charge the jury that the burden was on plaintiff to prove that the defendants *was* negligent in
64 leaving the track in bad fix or in leaving the draw-head in bad condition.

2nd. That the bad condition of the track or the draw-head caused the death of Cox.

3rd. That Cox was not guilty of negligence which contributed to or caused his death.

VII.

The court erred in refusing to charge the jury, as requested in special charge No. 3, that if Chas. Cox knew the condition of the track at Boyce when he went in to make the coupling, then plaintiff cannot recover on account of defective track.

VIII.

The court erred in refusing to charge the jury, as requested in special charge number 4, that the fact that the track was defective would not make defendants liable unless the defect in the track caused his death.

IX.

The court erred in refusing to charge the jury, as requested in special charge number 7, that the mere fact that Chas. Cox was injured while in service of the defendant is not sufficient to entitle plaintiff to recover, but it must be shown that some neglect of duty on part of defendant caused the injury and said Chas. Cox was free from fault.

X.

The court erred in refusing to charge the jury, as requested in special charge number 8, that the mere fact that there was a defect in the track or defect in the draw-head and that Chas. Cox was injured is not sufficient for plaintiff to recover. It must be shown that one of said defects caused the injury.

XI.

The court erred in refusing special charge number 9, asked by defendant, to the effect that the defendant did not owe the duty to Chas. Cox to keep the yard at Boyce ballasted up even up with the ties, but its duty was to keep the yard reasonably safe for the use to which they were subjected, and the mere fact that the ties were not filled in clear out to the end would not entitle plaintiff to recover.

XII.

The court erred in refusing special charge number 10, to the effect that there was no proof that any negligence of defendant caused the flat pin to be used in the draw-head instead of a round one, and that the jury could not find for plaintiff on the ground that the flat pin instead of a round one was used in the draw-head.

XIII.

The court erred in refusing special charge number 11, to the effect that the conductor and all persons in charge of the train are fellow-servants, and neither of them can recover on account of the negligence of the other.

XIV.

The court erred in overruling defendant's motion in arrest of judgment, because plaintiff's petition showed that plaintiff lived in Texas and plaintiff — Brown lived in the northern district of Texas.

XV.

The court erred in overruling defendant's motion for a new
65 trial on the ground that the verdict was excessive in amount.

The court having found and adjudged that the amount found by the jury was excessive and compelled the plaintiff to remit five thousand dollars of the amount found by the jury, said verdict, b-ing adjudged excessive, could not be corrected by the court in this way, and the remitt-ur filed by the plaintiff does not cure the objection.

Wherefore, in consideration of said cause, plaintiff in error prays that said judgment be reversed and the cause remanded.

F. H. PRENDERGAST,
Attorney for John C. Brown, Rec'r, Plaintiff in Error.

66 *Cost Bill.*

Clerk's cost	$52 20
Witness fees	16 70
Marshal's cost	8 96
Attorney's cost	25 00
Transcript	26 65
	$129 51

W. E. SINGLETON, *Clerk.*

Certificate.

EASTERN DISTRICT OF TEXAS, *ss:*

I, W. E. Singleton, clerk of the circuit court of the United States for said eastern district of Texas, holding session at Jefferson, Texas, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein Mrs. Ida May Cox is plaintiff and John C. Brown and Lionel A. Sheldon, receivers of the Texas and Pacific Railway Company, are defendants, as the same appears from the files and records of said court now remaining in — custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Jefferson, in said district, the 20th day of December, A. D. 1888.

{ Seal United States Circuit Court, Eastern District of Texas, at Jefferson. }

W. E. SINGLETON, *Clerk.*

Endorsed on cover: Case No. 13,491. E. Texas C. C. U. S. No. 327. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Ida May Cox. Filed February 15, 1889.

FILED
APR 15 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 327.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

IDA MAY COX,
Defendant in Error.

ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
Counsel for Plaintiff in Error.

C. G. Burgoyne, Cor. Walker and Centre Sts., New York.

Supreme Court of the United States,

OCTOBER TERM, 1891.

No. 327.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

IDA MAY COX.

ARGUMENT FOR PLAINTIFF IN ERROR.

Statement.

This was an action at law brought by the plaintiff (defendant in error) against John C. Brown and Lionel A. Sheldon, Receivers of the Texas and Pacific Railway, for damages for the death of her husband caused by the alleged negligence of the Receivers or their agents in the operation of the railroad. The action was brought in the Circuit Court of the United States for the Eastern District of Texas. The injury resulting in death, and the death, occurred

at Boyce, in the State of Louisiana, in the Western District of that State. The plaintiff, at the time the action was instituted, was a resident of Harrison County, in the Eastern District of Texas. John C. Brown, one of the defendants, was a resident of Dallas, in the Northern District of Texas. Lionel A. Sheldon, the other defendant, was a resident of New Orleans, in the Eastern District of Louisiana. These facts appear by the plaintiff's petition (Transcript, p. 5).

Deceased was a freight conductor in the employ of the defendant Receivers. He received the injury which resulted in his death while attempting to make a coupling of cars. The negligence imputed to the Receivers in plaintiff's original petition consisted in failure to maintain a roadbed well surfaced, free from grass, and with sound ties, properly spaced (Tr., pp. 6, 7). Plaintiff's amended petition, however, charges that the negligence consisted in the failure of the Receivers to provide suitable drawhead and coupling pin, the amended petition alleging (Tr., p. 10) "that the holes in the drawheads were round and the pins that were used in making the coupling were flat, or the holes were flat and the pins round—one or the other—which one plaintiff is unable to say." The right of recovery was placed upon the Statute of Louisiana, set forth in the petition (Tr., p. 11). No statute exists in Texas conferring a right of action or recovery in cases of death caused by negligence of Receivers or their agents and employees.

The defendants demurred to the petition upon the ground, first that the Court had not jurisdiction of the *cause*, nor of the *persons* of defendants; second, that the petition failed to set out a cause of action because it

showed that plaintiff's husband was killed in Louisiana and not in Texas. Defendants also answered (uniting demurrer and answer in the same pleading, in accordance with the statutory practice in Texas; Sayles Civ. Stats. of Tex., Art. 1262), (1st) denying all of the allegations contained in the petition, and (2d) charging that the injury and death were the result of the negligence of the deceased (Tr., pp. 9, 13, 14). Defendants also answered that the cause of action alleged in the amended petition was barred by the limitation statutes both of Louisiana and Texas (Tr., p. 13).

The demurrer was overruled (Tr., p. 14). Upon the trial of the issues the jury rendered a verdict in favor of the plaintiff for $15,000. Subsequently, upon an application for a new trial, the Court intimated that in its opinion the verdict was excessive, and a new trial would be granted unless the plaintiff remitted the sum of $5,000. Upon this suggestion the plaintiff did remit, and the judgment was modified by a reduction of its amount to $10,000 (Tr., p. 30).

Sheldon, one of the Receivers, resigned as such pending the trial of the action, and Brown, the remaining Receiver, by leave of Court, sued out and prosecuted the writ of error (Tr., pp. 1, 2). Subsequently, and in November, 1889, this Court, upon the suggestion of the death of John C. Brown, and with the consent of parties, made an order substituting the Texas and Pacific Railway Company (to which the railroad and property operated by the Receivers had been in the meantime delivered), as plaintiff in error instead of Brown, Receiver. This substitution was made upon the express stipulation filed in this Court that the same should not

"affect any of the questions or controversies presented by the record herein, and the questions and controversies presented by the record are to stand for the decision of this Court the same as if such substitution had not been made."

Assignment of Errors.

The plaintiff in error makes the following assignment of errors:

I.

The Court erred in its ruling on February 16th, 1888, in overruling defendants' demurrer to plaintiff's petition, because said petition did not show that the Court had jurisdiction of the cause or of the persons of the defendants. The petition showed that plaintiff lived in Harrison County, Texas, and the defendant John C. Brown lived in Dallas County, Texas, and defendant L. A. Sheldon lived in the State of Louisiana; wherefore, there could be no jurisdiction on the grounds of citizenship or residence of the parties.

II.

The Court erred in its ruling on February 16th, 1888, in overruling defendants' demurrer to the plaintiff's petition, because said petition did not show jurisdiction over the parties. There could be no jurisdiction on the ground of Federal question or the subject matter, because the petition showed that defendant Sheldon lived in the State of Louisiana and the defendant John C. Brown lived in Dallas County, Texas, which is not in the Eastern District of Texas, but in the Northern District of Texas, and the defendant must be sued in the district where he resides, except where jurisdiction depends on citizenship.

III.

The Court erred in its ruling on February 16, 1888, in overruling defendants' demurrer on the ground that Chas. Cox, plaintiff's husband, was killed in the State of Louisiana and not in the State of Texas, and suit being to recover damages occasioned by his death, and the law of Louisiana is not the same as the law of Texas on that subject.

IV.

The Court in its ruling on September 13th, 1888, in overruling the demurrer of defendants setting up limitation to defendants' amended petition. The original petition set up no cause of action, and the amended petition was filed more than one year after the death of the said Chas. Cox, and the amended petition set up *causes* for a recovery and items for damages not contained in the original petition.

V.

The Court erred in refusing special charge No. 1, to the effect that the jury must find for the defendant, because there was no evidence that the defect in the track caused the death of Chas. Cox nor that any defect in the drawhead caused the death of Cox.

VI.

The Court erred in refusing to charge the jury that the burden was on plaintiff to prove that the defendants *were* negligent in leaving the track in bad fix, or in leaving the drawhead in bad condition.

2d. That the bad condition of the track or the drawhead caused the death of Cox.

3d. That Cox was not guilty of negligence which contributed to or caused his death.

VII.

The Court erred in refusing to charge the jury, as requested in special charge No. 3, that if Chas. Cox knew the condition of the track at Boyce when he went in to make the coupling, then plaintiff cannot recover on account of defective track.

VIII.

The Court erred in refusing to charge the jury, as requested in special charge number 4, that the fact that the track was defective would not make defendants liable unless the defect in the track caused his death.

IX.

The Court erred in refusing to charge the jury, as requested in special charge number 7, that the mere fact that Chas. Cox was injured while in service of the defendant is not sufficient to entitle plaintiff to recover, but it must be shown that some neglect of duty on part of defendant caused the injury, and said Chas. Cox was free from fault.

X.

The Court erred in refusing to charge the jury, as requested in special charge number 8, that the mere fact that there was a defect in the track or defect in the drawhead and that Chas. Cox was injured, is not sufficient for plaintiff to recover. It must be shown that one of said defects caused the injury.

XI.

The Court erred in refusing special charge number 9, asked by defendant, to the effect that the defendant did not owe the duty to Chas. Cox to keep the yard at Boyce ballasted up even up with the ties, but its duty was to keep the yard reasonably safe for the use to which they were subjected, and the mere fact that the ties were not filled in clear out to the end would not entitle plaintiff to recover.

XII.

The Court erred in refusing special charge number 10, to the effect that there was no proof that any negligence of defendant caused the flat pin to be used in the drawhead instead of a round one, and that the jury could not find for plaintiff on the ground that the flat pin instead of a round one was used in the drawhead.

XIII.

The Court erred in refusing special charge number 11, to the effect that the conductor and all persons in charge of the train are fellow-servants, and neither of them can recover on account of the negligence of the other.

XIV.

The Court erred in overruling defendant's motion in arrest of judgment, because plaintiff's petition showed that plaintiff lived in Texas and defendant Brown lived in the Northern District of Texas.

XV.

The Court erred in overruling defendant's motion for a new trial on the ground that the verdict was excessive in amount. The Court having found and adjudged that the amount found by the jury was excessive, and compelled the plaintiff to remit five thousand dollars of the amount found by the jury, said verdict being adjudged excessive, could not be corrected by the Court in this way, and the remittur filed by the plaintiff does not cure the objection.

Wherefore, in consideration of said causes, plaintiff in error prays that said judgment be reversed and the cause remanded.

ARGUMENT.

1. The Court below was without jurisdiction.

Not only did the petition fail to show jurisdiction in the Court below, but the want of jurisdiction appeared affirmatively upon the face of the petition, and the objection was specifically pointed out by defendants' demurrer (Tr., pp. 9, 13 and 14). The petition shows that the plaintiff and one of the defendants, John C. Brown, *were both residents of the State of Texas.* The other defendant was a resident of Louisiana (Tr., p. 5).

It therefore appears affirmatively upon the face of the petition that the Court below was without jurisdiction, inasmuch as the plaintiff and one of the defendants were citizens of the same State.

If it shall be considered that the allegation in the petition that the defendant Brown was a *resident* of the State of Texas is not equivalent to an allegation that he was a *citizen* of that State so as to *affirmatively* show want of jurisdiction in this Court, then it is enough to say that *the record fails to show affirmatively that there was jurisdiction in the Court below.*

> "The facts upon which the jurisdiction of the Courts of the United States rest must, in some form, appear in the record of all suits prosecuted before them. To this rule there are no exceptions. * * * There are no presumptions in favor of the jurisdiction in the Courts of the United States."
>
> *Ex parte* Smith, 94 U. S., 455.

Jurisdiction in the Court below is not shown in the petition nor elsewhere in the record.

Where the jurisdiction of the Court below depends upon the citizenship of the parties, if the record does not show the necessary citizenship, the case will be stricken from the docket.

Bingham vs. Cabot, 3rd Dallas, 382.

When the record does not show a case within the jurisdiction of a Circuit Court, this Court will take notice of the fact, although no question of jurisdiction has been raised by the parties.

Grace vs. American Central Ins. Co., 109 U. S., 278.

When the jurisdiction of a Court of the United States depends upon the citizenship of the parties, such citizenship and not simply their residence must be shown in the record.

Robertson vs. Cease, 97 U. S., 646.

NO GROUND OF FEDERAL JURISDICTION INDEPENDENT OF CITIZENSHIP IS ALLEGED IN THE PETITION.

Even had the jurisdiction been claimed upon other ground than diversity of citizenship, it would have failed under the demurrer of the defendants (Tr., p. 9), by reason of the fact that the action was not instituted in a district whereof either of the defendants was an inhabitant. The petition shows (Tr., p. 5) that the defendant Brown was a resident of the City and County of Dallas, Texas. The County of Dallas is in the *Northern* District of Texas (20 U. S. Statutes at Large, 318), and not in the *Eastern* District, where this action was brought and maintained. The defendant Sheldon was an inhabitant of Louisiana. It therefore appears

that the action was brought and maintained *in a district whereof neither of the defendants was an inhabitant* (Acts of Congress of March 3, 1887, and August 13, 1888). The demurrer, raising objection to the jurisdiction of the Court of the persons of the defendants, presented this question (Tr., p. 9), and *personal* jurisdiction must, therefore, have failed, even if *general* jurisdiction would have existed by reason of the presence in the record of a Federal question. The record, however, presents no Federal question and it is not profitable to pursue this discussion.

With the record only as a guide we can do little more than speculate as to the theory or ground upon which the jurisdiction of the Court below was claimed or maintained. It is possible that the assumption may have been indulged that the Receivers should be regarded, in their official capacity, as citizens of Louisiana by reason of the fact that they were appointed by the Circuit Court of the United States, sitting in the Eastern District of that St te. But it is settled that the personal citizenship of Receivers, and other trustees, such as executors, determines the jurisdiction of the Federal Courts under the Acts of Congress.

In the case of Amory vs. Amory, 95 U. S., 186, Chief-Justice WAITE, delivering the opinion of the Court, said :

> " Where the jurisdiction of the Courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons. A petition for removal must therefore state the personal citizenship of the parties and not their official citizenship, if there can be such a thing."

In the case cited the petition for removal stated that "said plaintiffs, as such executors, are citizens of the State of New York."

In Davis *et al.*, Administrators, against Lathrop, Receiver, 12 Fed. Rep., 353, Mr. Justice BLATCHFORD, deciding a motion to remand, applied the same rule, saying:

"The defendant, while an officer of the New York Court and sued as such, was a citizen of New Jersey. He was a representative as much as an executor or a trustee is. In fact, he was a trustee. The personal citizenship of the executor or trustee is what is regarded"—citing Rice vs. Houston, 13 Wallace, 117–123.

It therefore is clear that there was no jurisdiction upon the ground of diverse citizenship, and that the defendant Brown (a resident of Texas) could not be treated as, in an official capacity, a citizen of Louisiana for the purpose of conferring jurisdiction.

ANCILLARY JURISDICTION ON THE EQUITY SIDE OF THE RECEIVERSHIP CAUSE.

It has been suggested that jurisdiction in the Court below was claimed and maintained upon the *sole ground* that the Court had been invested with ancillary jurisdiction of the equity cause in which defendants Brown and Sheldon were appointed Receivers, and that neither diversity of citizenship nor any other statutory ground of jurisdiction was asserted or relied upon by Court or counsel. Upon the theory of this view we may account for the following allegation incorporated in the plaint-

iff's amended petition but not included in the original petition: "And this Honorable U. S. Circuit Court at City of Jefferson was given ancillary jurisdiction of said Receivers of said property" (Tr., p. 10). It was perhaps also upon this theory that the plaintiff obtained from the defendants an admission recited in the bill of exceptions (Tr., p. 19) as follows: "That the defendants were appointed Receivers in New Orleans, as alleged by plaintiff" (that is, upon a bill in equity filed by the Missouri Pacific Railway Company in the Federal Court at New Orleans—Petition, Tr., p. 10); and that "an ancillary bill was filed in this Court in the case of the Missouri Pacific Railway Co., being Equity Bill No. 16 in this Court, and this was done by order of Judge DON A. PARDEE, of the United States Circuit Court, who appointed the Receivers, and he made an order giving this Court ancillary jurisdiction of that cause" (Tr., p. 19).

It is hard to understand what bearing the pendency of proceedings upon the *equity* side of the Court, *which are ancillary to an equity cause pending in another district*, can have upon the jurisdiction of the Court in this *action at law*. The plaintiff did not intervene in the equity cause. She brought a plain and ordinary action at law. It was begun by independent service of personal process, not by intervention in proceedings in which jurisdiction of subject matter had already been acquired. This action was tried by a jury in the usual way and, we may add, with the usual result. The case is not entitled in the equity cause. It is not a part of the record in that cause. It

is wholly foreign to it. Plaintiff did not submit her claims to the administration of the equity side of the Court. She was a stranger to the proceedings there. It seems obvious that the mere existence on the other side of the same Court of proceedings ancillary to an equity cause in which Receivers were appointed will not confer jurisdiction in an independent action against the Receivers on the law side of the Court, where no statutory ground of such jurisdiction exists.

In the case of Palmer vs. Shriven and another, Receivers, 21 Fed. Rep., 354, Judge PARDEE, in granting a motion to dismiss, for want of jurisdiction, a common law action for personal injury, says:

"Permission to sue must be given by the equity Court. Such permission cannot confer jurisdiction upon any other Court, *ratione materia* or *ratione personæ*. In this case the permission being obtained from the court of equity, this suit was permitted only to be brought in that Court. There is no permission to sue on the law side. *This Court, as a court of law, is without jurisdiction, so far as the record shows, by reason of citizenship of the parties, and, consequently, has no jurisdiction in the case.*"

See also Beach on Receivers, § 658.

The plaintiff may rely upon Section 3 of the Judiciary Act, approved March 3d, 1887, 25 Statutes at Large, 436, which provides:

"Sec. 3. That every Receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such Receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such Receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

In this connection we call attention to the fact that the repealing clause of said act contains this proviso :

"*Provided*, that this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act."

The Receivers were appointed in this case prior to March 3d, 1887 (Tr., p. 10). If the plaintiff shall claim any advantage by reason of the said 3d Section of the Act of March 3d, 1887, above quoted, our answer is that the receivership suit, being commenced and pending at the time of the passage of the said act, is expressly excepted from its provisions.

This point has been so expressly adjudged in the case of this very receivership by the learned Circuit Court of the Fifth Circuit.

See Missouri Pacific Ry. Co. vs. The Texas & Pac. Ry. Co., 41 Fed. Rep., 311.

It seems to be so plain that pending suits are excepted from the provisions of the act that it would be an attempt to construe a provision too plain for construction to elaborate the point. The result is that the present case must be determined wholly irrespective of the Third Section of the Act of March 3d, 1887.

The further result is that the case must be determined upon the doctrine of this Court laid down in the leading case of Wiswall against Sampson (14 Howard, 65, 66 and 67), to the effect that "when a Receiver has been appointed, his possession is that of the Court, and any attempt to disturb it without the leave of the Court first obtained will be a contempt on the part of the person making it," and that the remedy is to apply to

the Court, which appointed the Receiver, for the proper relief. See also the exceedingly able and learned judgment of the late Judge LOVE where the whole subject is extensively considered in the case of Thompson, Receiver, against Scott, 4 Dillon, 508.

But supposing, for the argument, that we are mistaken on this point, and that the third section of the Act of March 3, 1887, applies to the present suit, then we submit that it is clear that the permission which that act gives to sue a Receiver without the previous leave of the Court in which such Receiver was appointed, cannot confer any right to sue such Receiver in any Court *which has not by law jurisdiction over the suit thus to be brought.* Note that while the Act of March 3, 1887, provides that such suit may be brought without the previous leave of the Court, it does not prevent the claimant from asking for such leave. In the present case no such leave was applied for, nor was the present action brought with the sanction, or under the direction, of the Court that appointed the Receivers. The present suit is, therefore, in no sense a proceeding in the equity cause or a dependency of or an adjunct to it. We have no occasion, therefore, to discuss, nor has this Court any occasion to consider, whether the Court which appointed the Receivers would have had a right to make an order authorizing the institution of this action in the Circuit Court of the United States without reference to citizenship of the parties, since no such order was applied for or granted; and *non constat*, if it had been applied for, that it would have been granted. The right to bring the suit must be considered on the record as it stands, to wit, the record of a distinct and independent common-law action,

brought by petition in the nature of a declaration and commenced by summons on the common-law side of the Circuit Court of the United States for the Eastern District of Texas. It is just as distinct and as independent of the equity cause in which the Receivers were appointed or confirmed as though it had been brought against the Receivers in some Court of the State of Texas or in the Federal Court of Louisiana or of some remote district.

We submit that the Court below had no jurisdiction of this case.

This argument should, perhaps, be concluded at this point, inasmuch as the foregoing considerations seem to be conclusive of the case. We proceed, however, to point out other considerations which seem to us to require a reversal of the judgment below.

2. The alleged cause of action, founded upon the Statute of Louisiana, was not enforceable in the Federal Court in Texas. The case should have been dismissed on this ground.

The action was founded upon a statute of Louisiana, recited in the petition (Tr., p. 11), conferring a right of action upon the surviving relatives therein described, for damages for injuries resulting in death. The right to maintain such an action in the Courts of a State other than that in which the wrongful act was committed and the statutory remedy conferred, has been a question upon which the decisions have been numerous and conflicting. The rule in the several States has

never been uniform, but we think it may be safely said that the general tendency of decision in the State Courts has been adverse to the doctrine that actions of the character referred to may be maintained in the Courts of a State foreign to that where the wrong occurred and the statutory remedy existed.

This Court, in deciding the case of Dennick against Central Railroad Company, 103 U. S., 11, has announced the *general rule* that actions of this nature are transitory and may be brought in the courts (State or Federal) of such foreign State.

We submit, however, that in particular cases the question is one upon which the decisions of the highest State Courts and the policy of State legislation should be of controlling force in the Federal Courts. The present action was instituted in the Federal Court of Texas, and we submit that the rule suggested by the decisions of the highest State Court of Texas and by its legislative policy should have been adopted in disposing of this case. The rule that the Courts of Texas will not take jurisdiction of an action for damages of this character, where the cause arose in another State and under a foreign statute dissimilar in terms to the corresponding Texas statute, or where there is no corresponding Texas statute, has been repeatedly announced by the highest State Court in Texas.

Willis vs. Missouri Pacific Railway Co., 61 Texas, 434.

Texas and Pacific Railway Co. vs. Richards, 68 Texas, 375.

St. L., I. M. & S. Ry. Co. vs. McCormack, 71 Texas, 661.

The Legislature of Texas has never enacted any law

conferring a right of action or recovery in case of death resulting from injuries caused by the negligence of persons engaged as *Receivers* or their agents in the operation of railroads. The statute which confers such a right of action in cases where the railroad is operated by owners or proprietors, &c., does not embrace the case of such operation by Receivers. This has been adjudged by the Supreme Court of Texas.

Revised Statutes of Texas, Sec. 2899.
Turner vs. Cross, 18 Southwestern Rep., 578 (Feby. 5, 1892).

And in the case of Tex. & Pac. Ry. Co. vs. Collins, the Supreme Court of Texas, in an opinion rendered on the 22d day of March, 1892, has applied the same rule where it was sought to hold the present plaintiff in error liable for injuries, resulting in death, received through the alleged negligence of Receiver Brown and his agents in the operation of the Texas and Pacific Railway. The opinion is not yet reported, but a certified copy is filed herewith. The Court, MARR, J., said :

" The Receivers could not be held liable for injuries resulting in death under the common law, and Article 2899 of the Revised Statutes has not abrogated nor changed this rule of the common law in so far as Receivers of railroad companies are concerned. This has been expressly decided by the Supreme Court at the present term in the case of Turner vs. Cross and Eddy, and the commission has lately held also that the error, under the decision of the Supreme Court, is fundamental in character " (see Railway vs. Selph).

It therefore appears that judicial decision and legislative policy forbid the maintenance of such an action as the present in the State Courts of Texas. If such decision and policy be regarded—as we

submit they should be — as contolling upon the Federal Courts sitting in Texas, this action should have been dismissed in the Court below, and its judgment should be reversed here.

We believe that the foregoing argument is not rendered inadmissible by the judgment of this Court in Dennick vs. Central R. R. Co. *(supra)*. That case came up from the Circuit Court for the Northern District of New York, and this Court said that its decision was in harmony with the rule adopted by the Court of Appeals of New York.

3. Any cause of action which the plaintiff may have had was, in any aspect of the case, barred by the Statute of Limitation of both the States of Louisiana and Texas.

The supplemental answer of the defendants, filed February 16th, 1888 (the same day on which the amended petition was filed), raises the objection (Tr. p. 13). Their demurrer also raised the objection as follows:

"That plaintiff's cause of action as set up in said amended petition accrued more than one year before the filing of said amended petition; wherefore, the cause of action set up in said amendment is barred by the laws of limitation of the States both of Louisiana and Texas; wherefore, plaintiff cannot recover on said amendment" (Tr. p. 14).

The Court overruled the demurrer and defendant excepted (Tr. p. 14) and upon this point assigns error (Tr. p. 32, 4th Assignment).

In Louisiana the limitation of one year for the bringing of such an action as the present is included in the statute creating the right of action (Tr., pp. 11 and 30).

The statute is as follows:

"Law of Louisiana, No. 71.

"AN ACT to amend and re-enact Article 2315 of the Civil Code.

"SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That article two thousand three hundred and fifteen (2315) of the Civil Code, be amended and re-enacted so as to read as follows:

"ARTICLE 2315. Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the surviving minor children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, *for the space of one year from the death.* The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband, or wife, as the case may be."

The statute of Texas is as follows:

Art. 3202—Sayles Texas Civ. Stats., Vol. 2 (p. 115).

"ACTIONS TO BE COMMENCED IN ONE YEAR. There shall be commenced and prosecuted within one year after the cause of the action shall have accrued, and not afterward, all actions or suits in court of the following description":

* * * * * *

"4. Actions for injuries done to the person of another where death ensued from such injuries; and the cause of action shall be considered as having accrued at the death of the party injured."

As has been shown heretofore, no ground whatever of Federal jurisdiction was alleged in the plaintiff's petition, but on the contrary it appeared affirmatively

upon the face of the petition that the Court was without jurisdiction of the cause, inasmuch as the plaintiff and one of the defendants were citizens of the same State. If the theory of jurisdiction suggested at page 11 of this argument is the one which was asserted by the plaintiff and accepted by the Court—namely, that the jurisdiction existed by reason of the fact that the suit was brought upon the law side of a Court having on its equity side auxiliary jurisdiction of the cause in which the defendants were appointed Receivers—then the only petition (to wit, the amended petition, Tr., p. 9) suggesting any theory of Federal jurisdiction was filed more than one year after the cause of action arose. It appears that the injuries resulting in the death of plaintiff's husband and the death itself occurred on the 6th day of January, 1887 (Tr., p. 15), and the amended petition was filed on the 16th day of February, 1888 (Tr., p. 12). The original petition failing to show any jurisdiction in the Court—failing to suggest even a theory of jurisdiction, but, on the contrary, showing affirmatively that no jurisdiction existed—was a nullity and had no effect whatever to interrupt the running of the statute. The Statute of Limitations runs until a cause of action within the jurisdiction of the Court is asserted.

In Johnson vs. Dist. of Columbia, 1 Mackey, page 427, Mr. Justice Cox, delivering the opinion of the Court, said :

"We think the original declaration did not state a cause of action, but that such cause of action was stated for the first time in the amendment, and that it is equivalent to bringing a new suit as of the date when the amendment was filed, and that the defendant cannot be deprived of the opportunity of pleading the

defense of limitations by the circumstance that this amendment, stating a cause of action for the first time, was added to the declaration filed within the statutory period, and, therefore, the demurrer to the plea was wrongfully overruled by the Court below."

The only pleading which did not upon its face directly contradict the idea of jurisdiction was filed more than a year after the cause of action arose. The statute had run its full course, and the cause was therefore barred.

Moreover, the only specific allegation of negligence contained in the amended petition is the charge relating to the unsuitable adjustment of coupling pin and draw-head (Tr., p. 16). This was an entirely new charge of negligence, a new cause of action, or a new ground of action. No such cause or ground of action had been asserted within the period required by the law of Louisiana creating the right of action, or by the law of Texas—the law of the forum.

4. **There was no evidence of negligence upon the part of the defendants, directly or indirectly causing the death of plaintiff's husband, or contributing to it. There was evidence of contributory negligence on the part of the deceased. The Court erred in its refusal to instruct the jury to find for the defendant as requested** (Tr., p. 20).

ALLEGED NEGLIGENCE OF DEFENDANTS.

The bill of exceptions states :

"It was proven that the condition of the roadbed and the place where Chas. Cox, dec'd, was injured at the time he was hurt was as stated in the evidence of the witness S. P. McNeese (Tr., p. 17)."

The testimony of McNeese appears at pages 15 and 16 of the record.

It may therefore be assumed that the roadbed at the place where the injury occurred was not surfaced to the top of the ties, except between the rails, and that the distance between the cross-ties was irregular. There is not, however, a word of testimony identifying these conditions with the cause of the injury, or showing that they contributed in any way to cause the injury.

"As this case is presented to assume that there is sufficient evidence to establish that the injury was caused by the negligence of the appellant, we would have to rely solely upon the fact that the part of the track where the deceased was found may not have been in good order ; when, if this be admitted, it is but a fact which may not in the slightest degree have caused the injury" (see P. & R. R. R. Co. vs. Schertle, 2 American & English Cases, 158 ; Corcran against Railway Co., 133 Mass., 507).

It appears by the testimony of Sam Patterson (Record, p. 17) that the draw-head and coupling pin, which, it was alleged, were unsuitably adjusted, belonged to a "P. C. & St. L." car. They were not the property of the Receivers or of the Receivership.

In Thompson on Negligence (Vol. 2, p. 1053), the

following proposition is supported by the citation of numerous cases :

" *Burden of proof.* In an action by an employee against his employer for injuries sustained by the former in the course of his employment from defective appliances, the presumption is that the appliances were not defective; and when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this fact, and was not negligently ignorant of it. In like actions for injuries sustained by reason of incompetent fellow servants, the presumption is that the fellow servant was not incompetent, and that the master was not negligent in employing him or retaining him in his employment. Therefore, in such actions, the *onus probandi* is upon the plaintiff to negative these presumptions, in order to make out a *prima facie* case."

In this case there is no evidence whatever showing or tending to show a failure of proper inspection. There is no evidence showing or tending to show that employees of the company whose duty it was to inspect the cars were incompetent or that they failed in any respect in the performance of their duty. There is no evidence that the alleged defects in the appliances of the P. C. & St. L. car were known to the Receivers, or might have been known by any reasonable inspection, or that they were guilty of any omission or neglect in the employment of incompetent service.

The car and its appliances were the property of another company, and the duty of maintaining them in proper condition did not devolve upon the defendant Receivers. They were not responsible for defects in any of these appliances, if any such existed. It is a matter of common knowledge that foreign cars pass and repass in a desultory and irregular way over all of the roads of the

United States. The companies upon whose lines such foreign cars happen to be temporarily employed cannot be charged with responsibility for their *condition*. They constitute no part of the owned equipment in respect to which there exists, not only the duty of proper maintenance, but the opportunity to repair and maintain. There was no negligence attributable to the Receivers, either in fact or in legal theory, because of the temporary presence upon their lines of a foreign car whose appliances were not properly adjusted, unless such presence was due to the want of reasonable inspection. Of this there was no proof. We submit, therefore, that the Court below erred in refusing to give the jury the following charge, requested by defendants (Tr., p. 24):

"There is no proof that any negligence of the defendants caused the flat pin to be put in the drawhead instead of a round one.

"You cannot find for plaintiff on the ground that it was negligence to have a flat pin instead of a round one."

It is a matter of common knowledge that there is no uniform standard of appliances among the railroad companies of the United States. There is no evidence showing or tending to show that the use of a flat pin in a draw-head having a round hole is in itself negligence. On the contrary, the testimony shows that this was a usual adjustment (Tr., p. 18). This adjustment is recommended by a familiar law of mechanics. A flat pin properly adjusted in a round hole in the draw-head, so that the strain is upon the edge and not upon the flat side, is stronger than a round pin containing the

same amount of metal. It is upon this principle that flat pins have come into use. There is no evidence to show that the car, when it started on its journey, was defective or that any defect or defective adjustment which may have existed could have been known by any reasonable inspection. A coupling pin, properly adjusted when the car started upon its journey, may, by an ordinary strain, be bent out of adjustment so as to lock or fasten it—requiring force or hammering to extricate it. The extrication of the pins so locked or fastened and the correction of such accidental adjustments is obviously the business of the car coupler. If any such conditions existed in the present case, it was the business of the deceased to deal with and correct them.

Moreover, the mere existence of this adjustment of drawhead and coupling-pin is all that the testimony discloses. There was no proof whatever tending to show that, if defective, the defect caused or contributed to the injury to the deceased.

The case should not have been permitted to go to the jury.

It was error to refuse to give the jury the proposed charge of the defendant as follows:

"In this case there is no evidence that the defect in the track caused the death of Chas. Cox, nor is there any evidence that the defect in the draw-head caused the death of Chas. Cox.

There being no evidence of any negligence on the part of the defendants, you will, therefore, return a verdict for the defendant" (Tr., p. 20).

CONTRIBUTORY NEGLIGENCE OF DECEASED.—NEGLIGENCE OF HIS FELLOW SERVANTS.

Clearly the defendant Receivers did not owe to their employee any duty to personally inspect the appliances of foreign cars handled by him. That precaution or duty was the immediate and personal concern of the employee himself—of no employee more immediately than of the freight conductor engaged in making up a train of mixed foreign and home cars. If injured by reason of the ill-conditioned appliances of a car over which his employers had no control and for whose defects they were not responsible, they cannot be required to make reparation. If the injury resulted from his own want of due vigilance and care there is no remedy. But if it be claimed that to permit the presence of a defective car upon the lines of railway operated by the Receivers was in itself negligence, then clearly the negligence was that of the deceased or his fellow servants. In this view there was no ground for recovery under the common law rule which prevailed both in Louisiana and Texas.

Poirier vs. Carroll, 35 La. Ann., 699.
G. C. & S. F. Ry. Co. vs. Blohn, 73 Tex., 637.

The contributory negligence of the defendant also appears by the testimony of Albert Kneggs (Tr., p. 17) and Geo. W. Phillips (Tr., p. 18), from which it appears that the deceased at the time when he received the injury was endeavoring to make a coupling of cars while walking backwards. It was night and the ground

was covered with snow. The plaintiff introduced no evidence whatever showing or tending to show that the injury to deceased was due to any negligence of defendants. On the contrary, the only evidence relating to his conduct tends to show that the injury was due to negligence on his own part.

Upon the foregoing considerations we ask that the judgment below be reversed, and the case remanded with instructions to dismiss.

JOHN F. DILLON,
WINSLOW S. PIERCE,
For Plaintiff in Error.

Office Supreme Court
FILED.
APR 19 1892
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 327.

TEXAS AND PACIFIC RAILWAY COMPANY

vs.

IDA MAY COX.

Brief of W. Hallett Phillips for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 327.

TEXAS AND PACIFIC RAILWAY COMPANY

vs.

IDA MAY COX.

Brief of W. Hallett Phillips for Defendant in Error.

This action was originally brought by Mrs. Cox against Brown and Sheldon, the receivers of the railroad, to recover damages for the death of her husband, Charles Cox, resulting from their negligence while operating the road.

Brown having become sole receiver, the suit was continued against him, and it resulted in a verdict and judgment for $15,000 in favor of plaintiff. A new trial was refused on a remittitur being filed for $5,000.

The writ of error was prosecuted by Brown, receiver. Pending the same he died. The receiver having been in the meantime discharged and the road restored to the company, with a liability to discharge obligations of the receiver, this Court, on motion, substituted the company as the plaintiff in error in the present cause.

The record contains fifteen assignments of error.

Preliminary objection is made to the jurisdiction of the court below.

It is said that the required diversity of citizenship was not shown to authorize the circuit court to entertain the cause.

A sufficient answer is that the jurisdiction does not rest on citizenship, but on the nature of the cause.

It was admitted that the defendants were appointed receivers in the circuit court for the eastern district of Louisiana, in the suit of the Missouri Pacific Railroad and Texas and Pacific Railroad Company, by Judge Pardee, the United States circuit judge.

An auxiliary bill was filed in the circuit court for the eastern district of Texas (in which court the present action was brought) by order of Circuit Judge Pardee, and that court was given ancillary jurisdiction of the receivership cause and over the receivers. (R., 19.)

The receivers appeared and, their demurrer having been overruled, answered on the merits.

The suit was maintainable irrespective of citizenship.

If, instead of presenting her demand in a formal action, the plaintiff had filed an intervention in the receivership cause, we do not suppose her petition would have been objected to on the ground now taken.

This Court has often said that, the United States court having jurisdiction in the main cause, all ancillary proceedings can be taken in the same court, although the allegations of citizenship could not have supported them as independent and original proceedings.

Pacific R. R. *vs.* Mo. Pac. R. R. Co., 111 U. S., 522.
Dewey *vs.* Coal Co., 123 U. S., 333.

It makes no difference that the form of the proceeding is that of a separate suit instead of an intervening petition.

The only ground of proceeding at all was that the court had ancillary jurisdiction over the receivers and the road, and the only jurisdiction the court could or did exercise was of that character.

It was ordered that a copy of the judgment in the present case should be forwarded to the circuit court for the eastern district of Louisiana, to be filed in the papers of the receivership and called to the attention of that court. (R., 28.)

The jurisdiction was simply exercised to establish by judgment the existence and extent of the claim.

The manner in which the judgment was to be satisfied was properly left to be determined by the court appointing the receivers, as that court must have control of all moneys coming into the hands of the receivers and the right to administer the same.

It is argued that because the suit was one on the common-law side of the court it cannot be considered as ancillary to the receivership cause, pending on the equity side of the court.

But one of the most frequent instances of the exercise of ancillary jurisdiction is that of a plenary bill in equity to enjoin a judgment at law.

Krippendorf *vs.* Hyde, 110 U. S., 277.

The point is also made that the plaintiff did not possess the right to sue the receivers under the act of March 3, 1887, without the leave of the court, inasmuch as the receivership suit was instituted prior to the passage of the act.

This objection shows that if the jurisdiction was not sustainable on the ground we have stated, it could rest on the ground that the case is one arising under the laws of the United States, involving the right of the plaintiff to sue the receivers under the act of 1887 and the construction of that act.

McNulta *vs.* Lochbridge, 141 U. S., 331.

We submit there is no merit in the objection when applied to the facts of this case.

The trial court, having been invested with jurisdiction over the receivers, could entertain all claims presented against them.

Formal leave to sue was not necessary, inasmuch as the court took jurisdiction of the suit.

The defendant relies on the proviso to the act of 1887.

Section 3 of that act is as follows:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed, so far as the same shall be necessary to the ends of justice: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State or suit commenced in any court of the United States before the passage hereof, except as otherwise expressly provided in this act." (25 Stat., 436.)

It would seem a reasonable construction of the saving clause to hold that the pending suits, over which jurisdiction was not to be affected by the act, referred to suits which had been instituted against receivers without leave.

In an opinion delivered by Judge Pardee there are contrary intimations to this, and he holds that the pending suits refer to the suits in which the receivers had been appointed.

Missouri Pac. R'y Co. *vs.* T. and P. R'y Co., 41 Fed. Rep., 311.

As the contention is that the court below could not exercise jurisdiction for want of requisite citizenship, a very pertinent question is whether the court which appointed the

receivers could not have authorized the institution of this action, and whether what was done was not the equivalent of direct permission.

It is also objected that the cause of action was not enforceable in the Federal courts of Texas.

And that the right of action was confined to the courts of Louisiana, the State in which the death was incurred.

In this particular it is argued that the Federal courts must follow the adjudications of the Texas State courts, which had declared that they would not take jurisdiction of a cause of action for damages resulting in death where the cause arose in another State and under a foreign statute dissimilar to the Texas statute.

The question is one of general law, on which this Court had declared its opinion to the effect that actions of the nature of the one presented are transitory and may be brought in the Federal courts of a State other than that where the wrong occurred.

Dennick *vs.* Cent. Railroad, 103 U. S., 11.

A ruling such as that alleged to have been made by the Texas courts on a general question of law is not binding on the Federal courts. (Hough *vs.* Railroad Co., 100 U. S., 219.)

And those courts could hardly be called upon to disregard the ruling of this Court on the same subject and adhere to those made by the State tribunals; nor do the Texas cases relied on sustain the broad position of the defendant.

In Willis *vs.* Mo. Pac. R'y Co. the appellant sought to maintain in Texas a suit for injuries committed in the Indian Territory, *where the right was not allowed her*, on the ground that she could under the law of this State maintain a suit.*

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* Texas Statute, Rev. Stat., tit. LII, art. 2899:

An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

This the court held could not be done. They also remark that it had been suggested in some of the opinions that an exception might arise as to inability to recover damages for death where the killing was in another State. That exception had been rested on the fact that a similar statute existed in the forum of the action and where the cause of action arose. (McDonald *vs.* Mallory, 77 N. Y., 479; Whart., Conflict of Laws, 479.) This point the court say was not necessary to be decided. (61 Tex., 434.)

In Railway Co. *vs.* Richards the question decided was that the Louisiana statute subrogates the child, on the death of the father, to such right as the father had to recover damages for an injury inflicted on him. Such was not the Texas law, and it was held that in the particular mentioned the courts of Texas would not enforce the Louisiana law. (Railway Co. *vs.* Richards, 68 Tex., 376.)

In Railway Co. *vs.* McCormick it was argued that the Texas statute and that of Arkansas, where death was incurred, were similar, and therefore the action was properly brought.

The court say:

"When the courts are asked to enforce a right given under a local statute and it is made to appear that the act com-

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1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross negligence, or carelessness of their servants or agents.

2. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another.

Art. 2903. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

Louisiana Statute, Civil Code:

Art. 2315. Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the surviving minor children or widow of the deceased or either of them, and in default of these in favor of the surviving father and mother or either of them for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife, as the case may be.

plained of was committed out of the State, and it is shown that the laws of that State are similar to the local statutes giving the remedy, the duty of taking jurisdiction would be indicated if the local courts will recognize the action as transitory.

"A majority of the members of the court, however, are averse to assuming the duty of enforcing the *more complicated statutes of Arkansas.*"

The court held that such statutes were dissimilar in many respects from the Texas statute, and could not be enforced in the Texas courts.

But whatever the Texas State courts might accede to or decline as a matter of comity regarding the enforcement of plaintiff's right of action, the rule to govern the Federal courts in Texas is that announced by this Court.

The circuit court could not decline to entertain the suit because the death happened in Louisiana, or because the right to damages was given by the law of that State.

The point is now raised for the first time that the Texas law does not permit the recovery of damages for death against a receiver.

To sustain this view two decisions of the supreme court of Texas are cited. They were delivered while the present suit was pending here.

The only objection made in the court below bearing on the point is " that said petition does not set out a cause of action, because it shows that Charles Cox, the husband of plaintiff, was killed in the State of Louisiana and not in the State of Texas." (R., 14.)

If the point can now be raised it cannot control the disposition of the case.

There is no dispute that the receivers are liable under the Louisiana statute, and even if a suit against a receiver in such a case as the present, is *casus omissus*, in the Texas law,

the right to compensation for the wrong inflicted, conferred by the Louisiana law, is enforceable.

The petition alleges that under the laws of Louisiana the plaintiff is entitled to damages from the receivers for their negligence. (R., 11.)

The statute of limitation is interposed as a bar to the suit on the ground that under the Louisiana and Texas statutes, it was not commenced within one year after the cause of action had accrued.

The argument in support of this contention is put on two grounds:

1. That it was only in the amended petition that the Federal jurisdiction was shown, and that was filed more than a year after the death of Cox.

2. That the amended petition, in the statement as to the defective coupling apparatus, contained "an entirely new charge of negligence—a new cause of action or a new ground of action."

Judge Dillon's Brief, p. 22.

The answer is apparent. The original petition was filed within the period of limitation.

It stated the action was to recover damages for the death of Cox, resulting from the negligence of the receivers.

In order to sustain the jurisdiction, it was not necessary that all the jurisdictional facts should have appeared in the original petition, and because they were particularly specified in the amended petition as they appeared on the records of the court in the receivership cause, did not make such amended petition a new suit or a statement of a new cause of action.

The same is true as to the statement of the additional fact showing negligence on the part of the receivers as regards the coupling apparatus.

The objection that the suit was brought in the wrong district is not tenable after a party has gone to trial on the merits.

St. Louis R'y Co. *vs.* McBride, 141 U. S., 127.

The principal contention on the merits with which we are met, is that the court should have directed a verdict for defendants because there was no evidence of negligence on their part.

Whether the case should have been taken away from the jury, depends upon whether the state of the evidence was such that the court would have been compelled to set aside any verdict in favor of plaintiff.

When a cause depends on the effect of testimony it should never be withdrawn from the jury.

Plaintiff is entitled to every inference to be fairly drawn from the evidence.

North Pac. R'y Co. *vs.* Mares, 123 U. S., 713.

Kane *vs.* North Cent. Railway, 128 U. S., 95.

The general facts of the case are not in dispute.

The husband of plaintiff was the conductor of a freight train in the service of defendants.

While engaged in the performance of his duty of coupling cars within the limits of the railroad yard at Boyce, Louisiana, at night, he was run over by the cars and killed through the negligence of the defendants.

The immediate cause of his death were defects in the track at the place where he was coupling and in the coupling apparatus.

The suit is brought by his widow to recover damages from the defendants.

The facts showing the negligence were fully proved at the trial.

No objections were made by the defendants to any of the evidence introduced.

The bill of exceptions on the merits is confined to errors alleged to have been committed by the court in refusing instructions to the jury requested by the defendants.

The bill of exceptions recites "that the following facts were *proven;*" but, instead of stating such facts, makes a statement of evidence adduced.

There is no pretense that all the evidence was brought up.

It was shown by the evidence of McNeese and others that the road-bed at the place where Cox met his death was in an unsafe and dangerous condition.

This condition of the road-bed is admitted. (R., 17.)

Although in the railroad yard, the track was unsurfaced—that is, the ties were simply laid on the ground, the iron rails on the ties, and there was nothing filling in the spaces save a little dirt thrown in the middle of the track.

A railroad yard, a place where much switching and coupling is done, is not considered complete and safe until the ties are surfaced up.

To make a track safe and suitable the ties should be covered over in and outside of the iron rails.

A person coupling cars has to go between and walk over the ties, and he is liable to be hurt and is in much greater danger in coupling when they are unsurfaced than when they are surfaced.

A person in coupling cars stands with one foot on the inside of the rail and the other on the outside, and has to walk over the ties on the outside of the rail.

When the ties are unsurfaced there is great danger of a person coupling cars of having his feet caught under the ties, especially when the coupling is being done at night. (R., 15, 16, 17.)

McNeese testified, that after the injury he examined the left boot of Cox, and found it dented in just above the spur piece. The place looked like it had been caught by something and dented in.

"There was nothing at the place where Cox got hurt that would prevent his feet from going in between the ties, and that fact made the danger much greater when coupling up cars, and his feet would be in greater danger of being caught under the iron rails between the ties." (R., 17.)

There was much evidence of the same character.

In addition it was shown that the car which Cox was trying to couple when he met with his injuries, had a wrought-iron draw-head with a round pin-hole and a *flat pin* fast in it. The draw-head had to be raised and the pin had to be *hammered out* to make the coupling. (R., 17.)

It was while Cox was trying to pull this pin out that he got hurt, and the defective condition of the coupling apparatus and the defective condition of the track, caused his death.

An attempt was made by defendants to prove that the draw-head and pin were in good condition. It was admitted by a witness for defendants that the draw-head had a round hole and flat pin fast in it, although he endeavors to show there was no difficulty in getting the pin out. (R., 18.)

In this state of the evidence the judge delivered his charge. No mention is made of the charge in the opposing brief. Its soundness is shown by the fact that no exception was taken to it. We give it in full, because it presents the whole case on its merits, and shows that the questions arising in the case were fully and fairly explained to the jury:

"If you shall find from the evidence that the road-bed of the defendants was unsafe and dangerous, at the time and place where Charles Cox lost his life, for employés to couple cars, or that the coupling-pin on the car which he had disengaged and used was unsafe and dangerous for use by reason of its being square and the hole in which it was to be used being round, and that Charles Cox, the then husband of the plaintiff, was ignorant thereof, and, being then and there an employé of defendants, while engaged in coupling cars of a train whereof he was conductor lost his

life by reason of either or both of the above causes, then you will find for the plaintiff in such sum as will compensate her for the pecuniary loss of her husband, taking into view their circumstances in life, taking into consideration the probable pecuniary benefits that would have enured to her had he lived, whereof you have to form the estimate according to the best light which your reason may have afforded you and the testimony may have furnished.

"The averge age of human life and the insurance tables of expectancy are simply aids to your judgment, but are not conclusive upon your judgment. Your reasonable common sense and the evidence must form the estimate of the amount of loss.

"On the other hand, if you shall find either that the road-bed was not unsafe or dangerous, although not of the best character, or that the coupling-pin used was not unsafe or dangerous, although not as well adapted for use as a round pin, then you will find for defendant.

"And, again, if you will find from the evidence that both the road-bed and coupling-pin were unsafe and dangerous, yet if you shall find from the evidence that neither of these causes resulted in the death of Charles Cox, nor were the proximate causes producing the injuries whereof he died, then you will find for the defendant.

"It is incumbent on the plaintiff, before she can recover, not only to prove that defects complained of existed, but also that they or one of them were the cause of death.

"If the death was the result of accident, misadventure, or the want of care or prudence on the part of deceased, or other cause not complained of, plaintiff cannot recover.

"You must ascertain the true nature of the case and the actual cause of death from the evidence as adduced before you and render your verdict in accordance therewith."

(R., 27.)

All that remains is to see whether there is anything in the instructions asked and refused which should have been but were not included in the charge given.

The court was at liberty to state the case to the jury in its own way, provided the defendant was not unlawfully prejudiced by what the court excluded in its charge.

Twelve special prayers, embracing distinct propositions, were requested by the defendant and refused.

It is unnecessary to discuss each of these separately or in the order in which they were asked. We are satisfied the court will find that the substance of such of the prayers as correctly state the law or the facts, was contained in the charge of the judge, which he gave at his own suggestion.

Many of the prayers were plainly erroneous and for that reason correctly refused.

The court was asked to direct a verdict for the defendant on the ground "that there is no evidence *that the defect in the* track caused the death of Charles Cox, nor is there any evidence that *the defect in the draw-head* caused the death." (R., 20.)

The request itself confesses negligence and the only question the court was asked to submit was whether that negligence was the cause of death.

This question the jury were properly left to decide from all the facts and circumstances developed by the evidence.

The bill of exceptions does not purport to contain all the evidence. How, then, could this Court say that the court below should have directed a verdict for want of evidence in favor of plaintiff?

None of plaintiff's evidence now brought up was objected to by the defendant, and that evidence is quite sufficient to sustain the verdict.

The defendant, in order to overcome the effect of that evidence, introduced witnesses for the purpose of showing that the death of plaintiff did not result from defendant's negligence.

It was for the jury to decide this issue as well as the other issues of fact in view of all the evidence, and the court was right in its refusal to take the case away from the jury.

The matter embraced in the peremptory charge requested

was correctly put to the jury with distinctness in the charge given:

"If you shall find from the evidence that both the road-bed and coupling-pin were unsafe and dangerous, yet if you shall find from the evidence that neither of these causes resulted in the death of Charles Cox, nor were the proximate causes producing the injuries whereof he died, then you will find for the defendant.

"It is incumbent on the plaintiff before she can recover, not only to prove that defects complained of existed, but that they or one of them were the cause of death." (R., 27.)

It was incumbent on the plaintiff to establish negligence on the part of the defendants, in the condition of the track and coupling apparatus. She had also to show that the injuries resulting in death were in consequence of the defects.

This the jury were told. If there was contributory negligence on the part of Cox he could not recover. But contributory negligence is a defense to be proved by the defendant, and is not, as assumed in the prayers, a matter to be negatived by the plaintiff.

Railroad Co. *vs.* Gladmon, 15 Wall., 407.
Ind. & St. Louis R. R. *vs.* Horst, 93 U. S., 291.

The court told the jury on this head that to justify a verdict for the plaintiff Cox must have been shown to have been ignorant of the defects complained of.

In addition it was said, "if the death was the result of accident, misadventure, or the want of care or prudence on the part of deceased, the plaintiff cannot recover." (R., 27.)

These extracts from the charge cover all that was proper in prayers 2, 3, 4, 6, 7, 8, 12.

These all relate to the question of negligence on the part of defendant, contributory negligence, the burden of proof, and cause of death—subjects clearly explained to the jury in the charge in accordance with the substance of the prayers

asked. The fifth prayer which was refused proceeds on the ground that it devolved on plaintiff to show that it was the duty of Cox to couple the cars.

Such duty was alleged in the petition, and the statement is fully proven by the evidence brought up by the record, and there is not a word of testimony to the contrary.

It was claimed in prayer 9 that the defendant did not owe to its employés the duty to keep its yard ballasted up even with the top of the ties; that its duty is to keep its yards reasonably safe for the uses to which they are subjected.

This proposition is thus responded to in the charge given :

"If you shall find either that the road-bed was not unsafe or dangerous, although not of the best character, or that the coupling-pin used was not unsafe or dangerous, although not as well adapted for use as a round pin, then you will find for the defendant." (R., 27.)

The court was asked in prayer 10 to charge that there was no proof that any negligence of the defendant caused the flat pin to be put in the draw-head instead of a round one; that the jury could not find for the plaintiff on the ground that it was negligence to have a flat pin instead of a round one. (R., 24.)

How can this Court say whether there was or was not the evidence mentioned?

As the whole evidence is not brought up, it is consistent with the record to believe that there was abundant evidence on the point indicated, and that on this ground alone the court refused the request.

There was another sufficient reason for the refusal.

If any part of the cars or appliances was defective the defendants were as liable for injuries caused thereby as if the injuries were caused by the defective condition of the road-bed or track.

A verdict for defendant could not be claimed on the score that his negligence did not "cause" the defects.

The employer is bound to furnish reasonably safe appliances for the use of employés.

There must be used all reasonable care and prudence for their safety, and the employer is responsible to them for any injury which may happen to them from any defect in such appliances which were or ought to have been known to the employer, but which were not known to the employé.

Northern Pac. R. R. *vs.* Herbert, 116 U. S., 642.
Washington R. R. *vs.* McDade, 135 U. S., 555.

Whether the defective condition of the draw-head and track was or was not negligence on the part of defendant, and whether they were the proximate causes of the death of Cox, were questions which were correctly left to the jury to determine from the evidence.

Railroad *vs.* Stout, 17 Wall., 664.
Jones *vs.* East Tenn. R. R., 128 U. S., 445.
Island & Coasting Co. *vs.* Tolson, 139 U. S., 559.

The court was requested in prayer 11 to instruct the jury "that the conductor and other persons in charge of the train are all fellow-servants, and neither of them can recover for or on account of the negligence of the other." (R., 24.)

This prayer was correctly denied. It was irrelevant.

There was no issue as to fellow-servants, and no such question is involved in the case.

The death of the conductor, Cox, was caused by the negligence of his employer; not by the negligence of a fellow-servant.

That negligence consisted in the defective condition of the cars and the track.

For those defects the employer is directly responsible, and cannot interpose between him and the servant who has been injured—a party who exercises the master's authority.

If the defects were due to agents of the defendants who failed to perform their duty, such agents would not be con-

sidered as fellow-servants of those who are engaged in operating the railroad.

Hough *vs.* Railroad Co., 100 U. S., 219.

As has been said, if the argument is well founded, it would follow that as a corporation can only act by agents or servants it would escape all responsibility for every species of injury caused by defective machinery and apparatus or badly constructed tracks, and other similar causes.

Snow *vs.* Housatonic Railroad, 8 Allen, 445.

A point is attempted to be made here for the first time, that it appears from the testimony of one of the witnesses, that the defective coupling apparatus belonged to "a P. C. and St. L." car.

From this single expression is founded an argument that the car was not the property of the defendant, but was "a foreign car," for the defects of which the defendant was not responsible. (Judge Dillon's Brief, pp. 23–27.)

The point, however, cannot be made here for the first time. No such defense was made in the court below.

No instruction was asked regarding it, and the point is not involved in the case.

We submit that the judgment should be affirmed and entered against the Texas and Pacific Railway Company.

W. Hallett Phillips,
For Defendant in Error.